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THE
LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

PROBATE, DIVORCE,
AND ADMIRALTY DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL :

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

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DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

THE BALTYK.

1947

July 25, 28.

Pilcher J.

Shipping—Collision—Towage contract—Construction—Conditions—Tug, the servant of the ship—Owners of tug to be indemnified against "all losses, damage and claims whatsoever"—Collision of tug and third vessel during suspension of towage—Negligence of tug—Liability.

The plaintiffs, the Manchester Ship Canal Co., orally agreed to supply two tugs to tow the defendants' ship from Irwell Park to Eastham on the Manchester Ship Canal system, subject to the usual terms contained in the company's towage contract, which provided (inter alia) that on the hiring of the company's tugs for towage, docking, piloting or assistance services the master and crew of a tug became in all respects the servants and were under the control of the person in charge of the ship whilst the towage, docking, piloting or assistance services were being performed, and that the ship owner should indemnify the company against all losses, claims and damage whatsoever including damage sustained by the tug even though caused by the negligence of the company's servants. At Partington the towage was interrupted by the ship for her own purposes, the tugs were cast off and instructed to be available to continue after the ship had bunkered. The tug *Archer* remained at a quay nearby until the ship gave a five-blast

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BALTYK.

signal for its recall. While manœuvring to approach the ship for the purpose of making fast, the *Archer* negligently collided with the steamship *Salford City* and both vessels sustained damage. The tug owners claimed to be indemnified in respect of damage to their tug and their liability to the *Salford City* under the terms of the contract :—

Held, (1.) that the towage began and the conditions became applicable when the tug connected up with the *Baltyk* at Irwell Park ; (2.) that, whatever the position might be during the time that the tug was “ stood off,” when the ship gave the signal for its recall and the tug began to manœuvre in close proximity to the ship for the purpose of making fast “ towage . . . or assistance “ services were being performed,” and the defendants became liable under the contract.

ACTION.

The plaintiffs, the Manchester Ship Canal Company, were the owners of the motor tug *M.S.C. Archer* ; the defendants were the owners of the steamship *Baltyk*. On July 13, 1943, the plaintiffs orally agreed by their agents with the defendants to supply two tugs at one inclusive charge to assist the *Baltyk* from Irwell Park, Manchester, to Eastham, both on the Manchester Ship Canal system. It was an implied term of the contract of employment that the tugs should be engaged on the usual terms and conditions which were well-known to the defendants or their agents, and which contained (inter alia) the following :—“ It is further agreed that on the hiring “ of the Company’s tugs for towage docking, piloting, or “ assistance services, the master and crew of such tugs become “ in all respects the servants of and are identified with the “ ship, and are under the control of the person in charge of “ the ship, whilst the towage, docking, piloting, or assistance “ services are being performed.”

“ Further, the hirer agrees to indemnify the Company “ against all losses, damage and claims whatsoever, including “ damage sustained by the tug . . . even though caused by “ the neglect or default of the servants or agents of the “ Company.”

During the towage the *Baltyk* for her own purposes, stopped at Partington to take in bunker coal, the tugs were cast off and instructed that the towage would be continued in a few hours, to remain available for that purpose and informed that a five blast signal would be sounded by the *Baltyk* to indicate that the ship was ready for them. The tug *Archer* moored alongside a quay some 230 yards from the ship.

After a stay of some seven hours the *Baltyk* sounded the signal for the tug to return and continue the passage. While manœuvring to approach the *Baltyk* and to make fast to the *Baltyk* and about 100 feet from her the tug *Archer* negligently collided with the steamship *Salford City* both vessels sustaining damage.

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THE
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The liability for the collision between the *Archer* and the *Salford City* having been settled on a basis of both vessels being to blame, and the defendants having accepted such settlement as being reasonable, the plaintiffs in the present action asked for a declaration that the defendants were liable to indemnify the plaintiffs under the towage clause in respect of their liability for such portion of the damage sustained and inflicted by the *Archer* as the plaintiffs did not recover under the settlement with the owners of the *Salford City*.

The defendants denied that at the time of collision the tug was manœuvring to make fast to the *Baltyk*. They contended that at the time of the collision no towage or assistance services were being performed by the *Archer*, either under the terms of the towage agreement or at all, and that the plaintiff were not entitled to be indemnified.

K. S. Carpmael K.C. and R. E. Gething for the plaintiffs:—

The plaintiffs are entitled to be indemnified both in respect to the tug itself and her liability to the *Salford City*. There was one contract only, namely, from Manchester to Eastham with a stop at Partington for bunkers; and one inclusive charge. The hiring began at Irwell Park and terminated at Eastham. *The Ramsden* (1) was different from the present case; there the hiring was not intended to begin until the tug was actually towing. In the present case the hiring had unquestionably started and the defendants, for their own purposes, had stopped at Partington for bunkers. It is quite clear that the tug *Archer* was engaged in performing the towage contract at the time when she came in collision with the *Salford City*. Even if the first contention that this was one and indivisible service is too broad, the defendants are liable because the collision took place while the tug was actually engaged in manœuvring towards the *Baltyk* in response to signal given by that ship to indicate the vessel's readiness to resume the towage journey. Reference was made to *The Uranienborg* (2).

(1) [1943] P. 46.

(2) [1936] P. 21.

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THE
BALTYK.*Sir Robert Aske K.C. and Roland Adams* for the defendants :

This claim ought to be dismissed and judgment given in favour of the defendants. Special principles of construction apply to these towage contracts. The clauses are exceptional ; the doctrine of *contra proferentem* applies a restrictive construction : *The Clan Colquhoun* (1). The clauses are so onerous that the court will not give effect to them if any other reasonable interpretation is possible. The ordinary principles of construction are not applicable. In any view of the towage contract the plaintiffs are not entitled to recover in view of the clause " whilst towage, docking, piloting, or assistance services are being performed." Those words really mean " whilst towing " or " whilst assisting " ; it is only then that liability can arise. It cannot be said that a tug admittedly 100 feet away is " assisting " a vessel. Merely being " in attendance " is not sufficient to attach liability to the defendants.

Carpmael K.C. in reply.*Cur. adv. vult.*

July 28. PILCHER J., after stating the facts, said :— It is quite clear that the contract entered into between the parties was for the assistance of the *Baltyk* for the whole transportation from Manchester to Eastham. It is common ground that the arrangement was made by telephone on July 13, and the appropriate rate paid for this single transportation. In the result the actual progress of the *Baltyk* down the canal was interrupted for some eight hours at Partington in the circumstances which I have already detailed. During this interruption the *Archer* by her negligence sustained and inflicted damage and it is on these facts that the terms of the towage contract have to be considered. The material clause of the contract is as follows :—" It is further agreed " that on the hiring of the Company's tugs for towage, docking, " piloting or assistance services, the master and crew of such " tugs become in all respects the servants of and are identified " with the ship, and are under the control of the person in " charge of the ship, whilst the towage, docking, piloting or " assistance services are being performed."

I have little doubt that technically the " hiring " of the two tugs was completed on the telephone on July 13. It is clear that the two tugs entered on the performance of the

agreed services at the latest when they commenced to tow or assist the *Baltyk* at Irwell Park. The contract service was to tow and assist the *Baltyk* the whole way to Eastham and it would seem to follow that, having entered on the service contracted for the defendants are prima facie bound by the conditions of the contract unless, on a reasonable construction of the wording of the contract, it can be shown that the operation of some or all of its terms was liable to suspension during the course of the service.

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THE
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Sir Robert Aske, on behalf of the defendants, submitted quite rightly that towage clauses imposing onerous responsibilities on the hirer of tugs should in principle be construed contra proferentem. Whilst constrained to agree that the tugs had in this case entered on the performance of a service which was one and indivisible and which had not been completed when the events occurred with which we are concerned, he submitted that the exemptive words of the clause only applied "whilst the towage . . . or assistance services "are being performed." He pointed out that at the time of her collision with the *Salford City* the *Archer* was not physically towing or assisting the *Baltyk* in any way and he submitted that, in the circumstances, the plaintiffs were not entitled to the protection of the clause.

It is perhaps desirable that I should here amplify in some degree the facts as I find them. At the time when the *Archer* and *Salford City* were in collision the *Baltyk* was singling up her moorings preparatory to casting them off. Personnel were on her forecastle head ready to take the *Archer's* wires. On board the *Archer* the eye of the towrope had been placed on the towing hook. Her two towing wires in the form of a bridle were shackled to the towrope ready to be passed to the *Baltyk* and made fast one on either bow. If the collision had not occurred a heaving line would have been thrown to the tug as soon as she was in position and the tow wires hauled on board the *Baltyk*.

Mr. Carpmael submitted :—(1.) That once the services commenced at Irwell Park the defendants remained subject to all the responsibilities imposed on them by the towage clause because the towage and assistance services was one and indivisible and was not complete until the vessel was brought to Eastham ; and (2.) That if this construction was too broad on the facts the *Archer* was, at the time of her collision, actually performing the towage and assistance services in that

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she was, in response to a summons by the *Baltyk*, endeavouring to manœuvre herself under the steamer's bow in order to pass towing wires for the purpose of continuing the physical service of towage and assistance.

I was referred to a number of cases which have some bearing on the point I have to determine. In *The Uranienborg* (1) a tug which was approaching a moored vessel in pursuance of a towage agreement was so negligently handled that she collided with and damaged the ship. The towage contract provided that the conditions applied "whilst towing" and further provided that "for the purpose of these conditions" the phrase 'whilst towing' shall be deemed to cover the "period commencing when the tug is in a position to receive" orders direct from the hirer's vessel to pick up ropes or lines "or when the towrope has been passed to or by the tug which ever is the sooner." The learned President held on the facts of that case that the tug had not brought herself within the definition clause and consequently that she was not entitled to the benefit of the conditions in the towage contract. That was a case where the towage contract had been concluded some days before but the parties had specifically provided when the conditions of the contract enuring to the benefit of the tug were to operate.

The Clan Colquhoun (2) was another case in which the parties had by their contract specifically provided that the towage was "deemed to commence when the tow rope had" been passed to or by the tug." The contract was for two tugs. After the head tug was fast the stern tug whilst manœuvring to make fast was so negligently handled that she was damaged by the ship's revolving propeller. Bucknill J. as he then was, held that in spite of the fact that the contract was for two tugs and one tug was already fast the second tug was not entitled to the benefit of the provisions of the towage contract because she was not in fact fast at the time when she sustained damage. In the course of his judgment he says (3) :—"In a case of this kind I think the court ought not to interpret the clause in question in such a way as to entitle the Port of London Authority to recover from the ship in respect of damage to their property through the negligence of the authority's servants if any other reasonable interpretation can fairly be given to the clause in question."

(1) [1936] P. 21.

(3) *Ibid.* 163.

(2) [1936] P. 153.

In that passage I do not understand the learned judge to be saying more than that, in the event of any ambiguity of language in a contract, a clause exempting one party from the consequences of negligence for which he would otherwise be responsible, or saddling an innocent party with liability for damage for which he would otherwise not be responsible, must, in accordance with the ordinary principles of construction, be read *contra proferentem*.

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The last case to which I need refer is *The Ramsden* (1). In that case a tug was ordered out to meet a steamship which was coming up channel. The learned judge found on the facts that, in manœuvring to get alongside the bows of the steamship to make fast, the tug was so negligently handled that she collided with and damaged the steamship. The contract under which the services were to be performed provided that "On the hiring of the tug for towage services the master and crew thereof become the servants of and are identified with the vessel towed." A number of other clauses followed. A further condition however provided that "These conditions of towage shall apply to any damage . . . that may occur to the vessel . . . requiring the tug . . . whilst the tug is in attendance upon or engaged in any manœuvre for the purpose of making fast to the vessel requiring the tug." On the facts of that case Bucknill J. found that the "hiring" contemplated by the parties started when the tug was actually towing. I confess that I have some difficulty in understanding this finding because, on that view, the damage which formed the subject matter of the action occurred before the hiring commenced and, therefore, necessarily before the parties were bound by the terms of the towage contract. In the result however Bucknill J. found that the tug was at the material time "in attendance on the ship and engaged in a manœuvre for the purpose of making fast." That being so he found that the towage conditions applied and that the tug was entitled to succeed.

Whilst the cases to which I was referred indicate the attitude of the court towards clauses of exemption in towage contracts none of them afford me any direct help in the solution of the present case.

A contractual service of towage or assistance rendered by a tug to a ship is essentially one in which in practice the physical operation of towing or guiding the ship is rarely

(1) [1943] P. 46.

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continuous throughout the performance of the whole service. Engaged tugs frequently escort a ship without any line fast. They frequently assist in turning a ship by pushing her without the use of a towrope and provided they are within hailing or signalling distance of the ship they are available for towage or assistance services at very short notice as required. In these circumstances even though not fast to the ship they are to use the common phrase "in attendance" upon her and ready to execute any order given to them by the ship. I have no doubt that in this sense the *Archer* was at the material time in attendance upon the *Baltyk* and manœuvring within 100 feet or so of her bows so as to get into a position in which she could pass her towing wires.

In each of the cases to which I have referred the period during which the conditions of the towage contract were to apply were defined. In *The Uranienborg* (1) there was a definition of what was meant by "whilst towing." In *The Clan Colquhoun* (2) the point of time when the towage was "deemed to commence" was defined, and in *The Ramsden* (3) the conditions prerequisite for the application of the towage condition were carefully set out in the contract.

In the present case there is no question but that the towage had begun and the conditions had unquestionably commenced to be applicable on the passage from Irwell Park to Partington. The condition which constituted the master and crew of the tug the servants of the ship only continued "whilst the "towage . . . or assistance services are being performed."

Sir Robert Aske argued that these words meant "whilst "some physical force was being exerted by the tug on the "ship either by strain imposed on a towrope or by the tug "pushing without a towrope." I am satisfied that such an interpretation is too narrow and that a tug is performing towage or assistance or docking services at least when she is fast to the ship whether she happens at the material time to be exerting any force on the movements of the tow or not. Similarly it is clear that she may be performing assistance or docking services by pushing with her nose even though she has no towrope fast. What precisely is meant by "piloting" services when used in reference to a tug I do not know and counsel were unable to tell me. It is clear however that the conditions in the present contract are intended to apply when such a service is being performed and the word

(1) [1936] P. 21.

(3) [1943] P. 46.

(2) [1936] P. 153.

"piloting" seems at least susceptible of an interpretation which would permit of its being carried out without any physical connexion or contact between tug and tow.

In the present case the *Archer* only moved away from the *Baltyk* and went alongside No. 3 Tip because, if she had remained moored alongside the vessel, she would to some extent have obstructed the passage of vessels up and down the canal. I am satisfied that the entries in her logbook with regard to "Booking off" only had reference to the conditions of service of her crew with regard to overtime, and that the *Archer* was at all material times "under the control" of the *Baltyk* in that she was ready to obey orders received from the ship and that the accident occurred when in pursuance of orders received from the ship she was manœuvring into a position to establish connexion in order to continue the physical operation of towage and assistance which her owners had contracted to perform. Without expressing any view as to the situation which might obtain if the tug had been involved in an accident whilst navigating in the canal during the time she was "stood off" by the *Baltyk* for any purpose unconnected with the towage and assistance services upon which she was engaged, I have come to the conclusion that when as in this case the contractual service of towage and assistance in its physical sense is interrupted for the ship's purposes it would be wrong to hold that an accident which occurs to a tug which in response to orders from the ship is manœuvring in close proximity to her tow for the purpose of making fast did not occur, to use the words of the contract in this case, "whilst the towage or assistance services are being performed."

To hold otherwise would in my view put an unduly limited construction on the fair and ordinary meaning of the words "towage or assistance services," even when those words appear in a clause of exception which, as Bucknill J. points out, has to be construed contra proferentem.

I accordingly give judgment for the plaintiffs for the declaration which they seek and a reference to the registrar and merchants to assess the sum due to them. The plaintiffs are also entitled to their costs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs : *Hill, Dickinson & Company.*

Solicitors for the defendants : *Holman, Fenwick & Willan.*

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BEER v. BEER (NEILSON CITED).

BEER v. BEER AND NEILSON.

Divorce — Desertion — Just cause for leaving — Where adultery of other spouse is suspected—Reasonable and sufficient belief in such guilt—Burden of proof.

Where a husband's belief in his wife's adultery is induced by conduct on the part of the wife of a suspicious or incriminating nature, that belief, if bona fide held, is sufficient in the absence of a reasonable explanation to justify the husband in absenting himself: but *secus*, where the belief, though bona fide held, is induced not by conduct of the wife but by extraneous circumstances.

Where a prima facie case of desertion has been made out by a wife the burden of proof is on the husband to satisfy the court that his belief in his wife's guilt is sufficient to absolve him from the charge of desertion.

Glenister v. Glenister [1945] P. 30 and *Wood v. Wood* [1947] P. 103 considered and distinguished inter se.

CROSS-PETITIONS for dissolution of marriage. The facts and arguments are fully stated in the judgment.

Claude Duveen for the wife.

Desmond Neligan for the husband.

Cur. adv. vult.

Oct. 30. WILLMER J. In this case I had before me cross-petitions by husband and wife for dissolution of their marriage contracted in December, 1933. The wife alleges that the husband deserted her in March, 1941. The husband denies that he is guilty of desertion. He denies that when he left in March, 1941, he did so with any intention of absenting himself permanently. According to him it was only later—in August of the same year—that he finally left his wife, and he says that he did so then because he had discovered that his wife had committed adultery. By his cross-petition he accuses his wife of adultery with Mr. Neilson, which he alleges took place at a boarding-house in Blackpool during the Whitsun week-end of 1941, and again, on various occasions in the matrimonial home at Kenton down to March, 1942.

The wife's case is that for some time prior to 1941, and more particularly since the husband joined the R.A.F. in December, 1939, she had noticed a change in his attitude and a growing

interest in other women. In March, 1941, the husband was home on leave, and another lady—Mrs. Parish—was staying in the house. The wife alleges that one morning she caught her husband in the lady's bedroom, apparently trying to kiss her; there was a row, and the husband left, saying that he was never coming back. She says that since that date the husband has never returned to cohabitation with her, though on one or two occasions he did come back to the house to remove his belongings and to have a row with her. On the last of these visits, in August, 1941, the husband roundly accused her of adultery with Mr. Neilson—a charge which both she and Mr. Neilson immediately denied. In the meantime, according to the wife's evidence, the husband had formed an association with another lady, now deceased, who lived in Southend, where the husband was stationed. The husband was subsequently posted to Australia, where he served until after the end of the war. During his absence abroad the wife wrote to the husband inviting him to return to cohabitation—but the husband renewed his accusation of adultery, and the correspondence between the parties led to nothing. The wife's case is that the breakdown of the marriage was primarily due to the husband's loss of interest in her—especially after his association with the lady in Southend—and that the charges of adultery against her were trumped up in an effort to justify his conduct in leaving her.

The husband's case is that nothing occurred during his leave in March, 1941, to cause a breakdown of the marriage. There was admittedly a row between him and his wife because of the incident when he was discovered in Mrs. Parish's bedroom. But this was no more than a "tiff," and he left fully intending to come home again in the ordinary way on his next leave. His next leave did not occur till August, and he then came home on a forty-eight hours pass. He arrived before his wife arrived from work, and while he was alone in the house he accidentally discovered certain incriminating evidence, which pointed irresistibly in his mind to the conclusion that his wife had been guilty of adultery with Mr. Neilson. This evidence consisted of a return half ticket to Swansea, where Mr. Neilson's home was, a boarding-house bill for three persons from a boarding-house in Blackpool dated June, 1941, a letter from Mr. Neilson's mother addressed to the wife in her maiden name, inviting her to visit Swansea for her holidays during Mr. Neilson's leave, two telegrams from Mr. Neilson signed "Frank"—the first

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announcing his impending leave, and the second giving the time of his arrival in London (which, by a curious chance, was due that very night)—and, lastly, a partly-consumed box of pessaries such as had never been used in the course of his own relations with his wife. The husband asserts that Mr. Neilson did in fact turn up about midnight, that he then charged them both with adultery and “left them to it”; thereupon he left the house, but continued to keep watch on it till five o’clock, up to which time there was no sign of Mr. Neilson leaving. The husband also said in evidence—and this is important—that what Mrs. Parish told him satisfied him that adultery had been committed in Blackpool.

Mrs. Parish was in fact called as a witness for the husband, but her evidence before me was quite inconsistent with the suggestion that adultery was committed at Blackpool. On the contrary, she said that so far as she knew (and she was living with Mrs. Beer at all material times), Mrs. Beer and Mr. Neilson had never committed adultery, either at Blackpool or elsewhere. She also, incidentally, confirmed the wife’s, and not the husband’s, account of the bedroom incident in March, 1941. It appeared from her evidence that Mrs. Parish had given statements to the solicitors for both sides. Counsel for the husband applied for leave to cross-examine Mrs. Parish as a hostile witness, but for reasons which seemed good to me I refused to grant such leave. I am bound to say, however, that having regard to all the circumstances I can place no reliance whatsoever on the evidence of Mrs. Parish, and I approach the decision of this case entirely without reference to anything that Mrs. Parish may have said in evidence. The boarding-house keeper at Blackpool was also called as a witness for the husband, but he was quite unable to give any useful evidence. The husband was therefore left with no corroborative evidence in support of the inferences sought to be drawn from the papers and articles found in his wife’s possession.

The evidence of the wife and Mr. Neilson was directed towards showing that the incriminating documents and articles discovered by the husband were all capable of, and in fact had, an innocent explanation. Mr. Neilson, prior to his joining the R.A.F. on war service, worked at the same place of business as the wife, and was well known to the husband as an acquaintance, as was also Mrs. Parish’s husband. It was alleged that the three men and their wives were hoping to be able to arrange to take their leave at the same time, so as to have a holiday

together. It was conceded that the wife spent the Whitsun week-end in Blackpool, but Mrs. Parish went with her, and the evidence of the wife and Mr. Neilson was that the two ladies shared a double room, while Mr. Neilson occupied a single room. Blackpool was selected because Mr. Neilson was stationed there and was thus easily able to book rooms. It was admitted that the wife in fact went to Swansea for a few days while Mr. Neilson was on leave there. It was to this impending visit that Mrs. Neilson's letter referred, and it was represented as being a perfectly innocent and long-standing arrangement. The box of pessaries was said to belong to Mrs. Parish—a matter about which counsel on both sides refrained from questioning Mrs. Parish.

There is no doubt in my mind that the discoveries made by the husband were such as to raise good grounds for suspicion in the mind of any ordinary husband, and to call for some explanation. But mere suspicion is not sufficient to justify a finding of adultery. An allegation of such gravity must be proved to the satisfaction of the court. Where the evidence pointing to guilt is entirely circumstantial, as it is in this case, having regard to the failure of Mrs. Parish and the boarding-house keeper to give the evidence which was obviously expected of them, it seems to me that it is quite impossible for the court to draw the inference of guilt, unless clearly satisfied that the facts relied on are not reasonably capable of any other explanation. In this case, having heard the evidence of the parties, I am far from being so satisfied. In my judgment the charge of adultery has not been made out, and it follows that the husband's cross-petition must fail.

Is the wife then entitled to succeed on her petition for desertion? It is argued that even if the charge of adultery has not been proved to the satisfaction of the court, the husband still has a good defence to proceedings based upon desertion if the conduct of the wife has been such as to create in his mind a reasonable belief that she has been guilty of adultery. In *Glenister v. Glenister* (1), in which a husband surprised his wife in circumstances of a most compromising character, it was held by the Divisional Court that although the husband's charge of adultery was not made out, he was entitled to succeed in his defence to his wife's charge of desertion, on the basis that the circumstances were such as to induce in his mind a bona fide and reasonable belief in his wife's guilt. This decision

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was distinguished in *Wood v. Wood* (1), where the only evidence of adultery was the birth of a child three hundred and forty-six days after the last date upon which the parties were proved by admissible evidence to have cohabited. The Divisional Court, following *Gaskill v. Gaskill* (2), declined to hold that the evidence was sufficient to convict the wife of adultery. They further held that since the husband's belief in his wife's guilt was not induced by such conduct on her part as would lead a reasonable person to believe her guilty of adultery, but was induced only by the apparently unusual period of gestation, no sufficient excuse for absenting himself from cohabitation had been made out to absolve him from a charge of desertion. In both these cases, it will be observed, the husband failed to make good his charge of adultery against the wife; but in the one his belief in her guilt was held to be sufficient to absolve him from a charge of desertion, whereas in the other it was not. I apprehend that the distinction between the two cases is this.

Where the husband's belief is induced by actual conduct on the part of the wife of a suspicious or incriminating nature, it is sufficient—provided it is bona fide held, and in the absence of explanation (which must, of course, be a reasonable explanation)—to furnish the husband with a good excuse for absenting himself. But where the belief is induced, not by actual conduct of the wife, but by extraneous circumstances, the result is different, even though the belief be bona fide held. To which class of case, then, does the present one belong?

Where, as here, a prima facie case of desertion has been made out, the burden of proof is in my judgment on the husband to satisfy the court that his belief in his wife's guilt is sufficient to absolve him. I will assume, in favour of the husband, that his belief in his wife's guilt is and was bona fide entertained. According to his evidence it was induced partly by the suspicious documents and articles which he discovered upon his visit to the matrimonial home in August, 1941, but partly also by what Mrs. Parish told him about the visit to Blackpool. It appears to me that Mrs. Parish's failure to confirm in her evidence here what she is said to have told the husband previously is the husband's misfortune. The fact is that in part at least the husband's belief was induced by the extraneous circumstances of what Mrs. Parish told him. The husband adduced no evidence, apart from his suspicious discoveries, of any association between his wife and Mr. Neilson.

(1) [1947] P. 103.

(2) [1921] P. 425.

Nor has there been a word in the evidence to suggest that the wife was ever in the habit of associating with other men. Having made his incriminating discoveries the husband does not seem to have paused to consider whether there might not be an innocent explanation. The rapidity with which he jumped to his conclusion lends some support to the wife's case that he had already made up his mind to desert, and was only seeking a plausible excuse. This, moreover, is not a case in which the wife has offered no explanation; on the contrary, she has put forward an explanation which, as I have already said, is sufficiently reasonable to make it impossible for me to say that adultery has been proved against her to my satisfaction. If the husband's evidence is right—namely, that there had been no final break before August, 1941—one is prompted to ask the question why the wife, if she were really guilty, was so careless as to leave so much incriminating evidence about for the husband to find whenever he might come on leave—perhaps unexpectedly. Bearing all these considerations in mind, the conclusion to which I have come is that the husband has not discharged the burden of proving that his belief in his wife's guilt was sufficient to absolve him from the charge of desertion. I, therefore, find in favour of the wife's petition, and there will be a decree accordingly.

Solicitors : *P. B. Topham, The Law Society, Services Divorce Department ; Edgar H. Hiscocks.*

J. B. G.

GOSS v. GOSS

Divorce — Evidence — Denial of condonation — Where such denial would bastardize a child — Admissibility.

Although the rule in *Russell v. Russell* [1924] A.C. 687 prevents proof of a charge of adultery by either spouse giving evidence of non-access, a spouse rebutting an allegation of condonation, or bringing or refuting a charge of contracting a venereal disease on an issue of cruelty, must necessarily be entitled to say that he or she did or did not have sexual intercourse at the time alleged.

The view expressed in *Glenister v. Glenister* [1945] P. 30 affirmed on this issue.

The criticism in *Morris v. Morris* and *Morris and Manning* [1947] P. 108 of the observations of the Divisional Court in *Glenister v. Glenister* (supra) on the matter is itself obiter, as the evidence of

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non-access in Morris's case was ultimately admitted after consideration of the period of gestation relative to the possible bastardization of the child.

HUSBAND'S APPEAL to the Divisional Court from an order made against him on the ground of desertion.

On March 22, 1946, at the court of summary jurisdiction for the borough of Bedford, the appellant was found guilty of desertion. He appealed, and on June 20, 1946, the Divisional Court ordered that the appeal be adjourned until after the hearing of his petition for divorce on the ground of his wife's adultery. It was stated in the petition that she had given birth to two children, the paternity of whom was not admitted by the petitioner, one in December, 1943, and one in May, 1946, and charges of adultery were made which were relevant to the date of conception of both children. The charge relevant to the conception of the second child was not however pursued, when in July, 1947, His Honour Judge Engelbach, sitting as a Commissioner of the High Court, pronounced a decree nisi on the ground of the earlier charge of adultery which he found had taken place at a time when the petitioner was overseas and had not been condoned. The decree nisi was made absolute in due course, and the respondent wife re-married.

At the hearing in March, 1946, before the magistrates the respondent was some seven months pregnant. She stated that her husband had had sexual intercourse with her on two occasions, namely, in April and in August, 1945. The magistrates refused to allow the husband to cross-examine her through his solicitor with a view to showing that she was not telling the truth on that matter, or himself to give evidence, with a view showing that he had not had sexual intercourse on either of the occasions, because the court had been notified that the wife was pregnant and that the legitimacy of the child might later be brought in question either by the husband's answers or by the wife's admissions. This point was emphasized by the circumstance that the child was born on May 13, 1946, nine months after the intercourse alleged to have taken place in August, 1945.

H. E. Park for the appellant.

The wife was not represented and did not appear.

LORD MERRIMAN P. stated the facts and continued: In my opinion it is enough to dispose of this appeal to say that

this court adjourned the case in order that there might be no conflict between proceedings in the magistrates' court and proceedings in the Divorce Division of the High Court, and in order that the magistrates might act, if it was necessary for them to act at all, or for this court to act, as the case might be (because this was a case where the appeal was already pending) with full information of what had been decided by one sitting as a judge of this Division. The learned commissioner has pronounced a decree on this material, that decree has been made absolute, and it seems to me, in those circumstances, that it is sufficient for us to say that had the facts thus put before the High Court been allowed to be put before the justices the result must have been different.

But although I think that would be enough, I feel impelled to add another word, because of a doubt which has been introduced by the judgment of Willmer J. in *Morris v. Morris, Morris and Manning* (1). In that case the learned judge criticized and dissented from the view expressed by this court in *Glenister v. Glenister* (2), to the effect that though *Russell v. Russell* (3) prevents proof of a charge of adultery by either spouse giving evidence of non-access, a spouse rebutting an allegation of condonation, or bringing or refuting the charge of contracting a venereal disease on the issue of cruelty, must necessarily be entitled to say that he or she did or did not have sexual intercourse at the time alleged; and we followed in *Glenister v. Glenister* (2) the well-known passage in Lord Dunedin's opinion in *Russell v. Russell* (4). Willmer J. has held, first, that our decision was obiter, and secondly that it was wrong. On reading *Morris v. Morris, Morris and Manning* (1) I cannot help observing that Willmer J.'s criticism of our decision or our observations in *Glenister v. Glenister* (2) is itself obiter, because he decided on the facts before him that the evidence was admissible as it could not possibly tend to bastardize the child, and, therefore, that it was not really necessary for him to consider the matter at all. It may very well be (on the ground on which *Glenister v. Glenister* (2) was ultimately decided) that though it was certainly necessary to go into the issues connected with the venereal disease, any observations directed to that issue were obiter dicta so far as the final result was concerned. But I feel impelled to go further: this question did not arise for the first

(1) [1947] P. 108.

(2) [1945] P. 30.

(3) [1924] A. C. 687.

(4) Ibid. 728, 729.

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time in *Glenister v. Glenister* (1). I am speaking now with an experience of fourteen years in this court, and I say without the slightest hesitation that the question has arisen over and over again; and I myself have given, and I am quite certain that other judges have given, on many occasions, decisions based upon evidence admissible to rebut an allegation of condonation or to enforce a charge of cruelty which, if directed solely to the question of adultery, would have been inadmissible under the rule in *Russell v. Russell* (2). I cannot believe that the law is such that a wife is permitted to say, on a charge of adultery, "True, I have committed adultery, but you had 'intercourse with me on such and such a date'—which happens to coincide with the probable date of conception of a child she is expecting—and yet the husband is not entitled to say that he did not have intercourse on that date, and is, by the exclusion of such evidence, to be held to have condoned the preceding adultery by the wife. That seems to me, with all respect, to make nonsense of the law, and whether or not we, sitting here to-day, are bound by *Glenister v. Glenister* (1), I propose to follow it, at any rate to follow that part of the judgment which is based upon the observations of Lord Dunedin in *Russell v. Russell* (3).

I do not ignore the awkwardness of the circumstance that in this case there was, in fact, a charge of adultery which does bear on the same question, whether or no the husband had intercourse in August, 1945. It is impossible, as a matter of nature, to dissociate the two issues, but in law, in my opinion, they are quite distinct; and I accept Mr. Park's assurance absolutely that that issue was not pursued before the learned commissioner, for the very reason that, founding himself upon our observations in *Glenister v. Glenister* (1), Mr. Park very properly indicated to the learned commissioner that the evidence of the husband was not admissible for the purpose of proving that charge of adultery, though it was admissible for the purpose of rebutting the allegation of condonation. In my opinion that was right, and I think the learned commissioner was perfectly correct in accepting the evidence.

For both these reasons, therefore, this appeal, in my opinion, should be allowed. I only wish to say, by way of postscript, that this appeal is being heard in the absence of the wife; but we are satisfied that she is completely disinterested in the

(1) [1945] P. 30.

(2) [1924] A. C. 687.

(3) Ibid. 687, 728, 729.

result, for when she was told that the case was coming on to-day she said that it was a matter of no interest to her whatever, as, since the pronouncement of the decree absolute, she had married again. That gives us the additional assurance that in allowing this appeal in her absence we are unlikely to be doing any injustice to anybody.

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Merriman P.

WALLINGTON J. I agree. It is really unnecessary for me to add anything, but I would like to say that, looking at the circumstances of this case as they are before this court now, I have a very strong feeling that the decision of the justices was wrong. I do not desire to discuss the very interesting question whether the evidence of a spouse may be given in order to establish or to refute condonation. After what my Lord has said I have no doubt that the view of this court is clear, that such evidence is admissible in some circumstances, and I incline to the opinion that it was admissible in this case. But, as I have said, without discussing the circumstances of the case, I have a strong view that the decision of the justices was wrong, and that on that ground this appeal should be allowed, independently of the question of admissibility of evidence that has been argued before us. If, in the future, this point of law should be raised, I confess that I should approach it with a strong bias in favour of the view that there is no doubt at all about the admissibility of the evidence, even if it fell to be determined on the law as it stood before the cases of *Glenister* (1) and *Morris* (2) were decided.

Appeal allowed.

Solicitors : *Ernest W. Long & Co., Agents for C. M. P. Burgess, Bedford.*

(1) [1945] P. 30.

(2) [1947] P. 108

J. B. G.

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Jan. 29 ;

April 28, 29 ;

May 20.

Divorce—Justices—Custody of child born prior to marriage—Legitimation by marriage—No declaration of legitimation—Legitimacy Act, 1926 (16 & 17 Geo. 5, c. 60), s. 1, sub-s. 1, s. 2—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49) ss. 188, 193—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), s. 5, sub-s. (b)—Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925.

Lord Merriman,
P. and
Jones J.Followed. HARRISON
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Where, by the subsequent marriage of his parents and by virtue of the provisions of the Legitimacy Act, 1926, a child has been legitimated, the court has jurisdiction in proceedings for divorce to make provision for the custody of the child under s. 193, sub-s. 1 of the Supreme Court of Judicature (Consolidation) Act, 1925; and a decree of legitimacy under s. 188 of the last mentioned Act is not a condition precedent to the exercise of that jurisdiction.

A child so legitimated is "a child of the marriage" within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925; for such phrases as "a legitimate child," "a legitimate child of the spouses," "a child born in lawful wedlock" and "a child of the marriage" are synonymous terms and it is not to be expected that Parliament will employ more than one of several such terms, in the alternative, to express its meaning.

M. v. M. [1946] P. 31 approved. *Bednall v. Bednall* [1927] P. 225, *Green v. Green* [1929] P. 101 and *Jones v. Jones* (1929) 45 T. L. R. 292 overruled.

In re Wicks' Marriage Settlement [1940] Ch. 475 distinguished.

HUSBAND'S APPEAL from an order of the justices for the county borough of Bolton, in the county of Lancaster.

On June 19, 1944, the respondent, being then a single woman, gave birth to a child. The appellant, who was also unmarried, signed the birth certificate as the father; and there was no dispute as to his paternity. The parties were subsequently married on March 16, 1946. No petition was presented on behalf of the child under s. 2 of the Legitimacy Act, 1926, and no declaration was made under s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925, that the child was the legitimate child of the parties.

On December 10, 1946, the justices found that the appellant had deserted the respondent and ordered him to pay her maintenance for herself and the child. They gave the custody of the child to the respondent.

The husband appealed on the grounds: (1.) that the justices had no jurisdiction to make any order with regard to the child; (2.) that the respondent in any event was not entitled to the custody of the child.

The justices, in their reasons, stated that in view of the decision in *Bednall v. Bednall* (1), *Green v. Green* (2), and *Jones v. Jones* (3) they would have held that they had no power to make an order as to custody of a child of the parties born

(1) [1927] P. 225.

(3) (1929) 45 T. L. R. 292.

(2) [1929] P. 101.

before marriage and which had not been the subject of legitimation proceedings in the High Court or county court, had it not been for the decision of Denning J. in *M. v. M.* (1); that although the question of their power to make an order as to the child was not raised by the parties, they had considered the matter and had come to the conclusion that they had such power and were justified on the facts in making it. They referred also to an article in the Justice of the Peace in support of their decision (2).

The appeal first came before the Divisional Court on January 29, 1947. The respondent wife did not appear and was not represented and the hearing was adjourned so that the child might be represented by the Official Solicitor. The Official Solicitor made inquiries as to the parties and their respective homes and, in consequence of his report, counsel for the appellant did not contend at the adjourned hearing that the justices were wrong in giving the custody of the child to the respondent if they had jurisdiction so to do.

Claude Duveen for the appellant. A child legitimated by the Legitimacy Act, 1926, was not a "child of the marriage" within the Summary Jurisdiction Acts. See *In re Wicks' Marriage Settlement* (3) as to meaning of "child of the marriage." See also The Widows, Orphans and Old Age Contributory Pensions Act, 1925, s. 44, sub-s. 4, and s. 42, sub-s. 3, of the Act of 1936 (by which Act the former was largely repealed), in both of which a child legitimated per subsequens matrimonium is "deemed to be a child born of the marriage." See also the Family Allowances Act, 1945, s. 21, sub-s. 3, where such a child is "deemed to be issue of the marriage." Such interpretations would not be necessary were such children "children of the marriage."

M. v. M. (1) was a divorce case and was not applicable in this appeal from a court of summary jurisdiction: the words used in s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, are more comprehensive than those in the Summary Jurisdiction Acts. But in any event, it is submitted, *Bednall v. Bednall* (4), *Green v. Green* (5), and *Jones v. Jones* (6) were rightly decided, and the practice of the courts should be followed.

Holroyd Pearce K.C. and *Stuart Horner* for the child. The

(1) [1946] P. 31.

(2) 110 J. P. N. 552.

(3) [1940] Ch. 475.

(4) [1927] P. 225.

(5) [1929] P. 101.

(6) 45 T. L. R. 292.

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Divorce Court has jurisdiction over " children, the marriage of " whose parents is the subject of the proceedings " (Supreme Court of Judicature (Consolidation) Act, 1925, s. 193, sub-s. 1) ; the courts of summary jurisdiction over " children " of the marriage " (Summary Jurisdiction (Married Women) Act 1895, s. 5, sub-s. (b)). It is submitted that the decision in *M. v. M.* (1) was correct and that a legitimated child can be dealt with by the Divorce Court without legitimation proceedings and that, where the necessary facts exist, the child is legitimated automatically. As to the powers of the courts of summary jurisdiction, a " legitimate " child must be a child of the marriage. The legitimation is notional—such a child is, as it were, born again into the marriage, taking its due seniority with its brothers and sisters (Legitimacy Act, 1926, s. 4) and so becomes a " child of the marriage." The words used denote status, not history, since historically a child born before marriage cannot be legitimate. *In re Wicks Marriage Settlement* (2) can be distinguished, and it would be wrong to confine the jurisdiction of all courts of summary jurisdiction because of a decision dealing with a power of appointment. By s. 6 of the Legitimacy Act, 1926, the child " has the same " rights . . . in respect of maintenance . . . as if he had " been born ' legitimate '." Therefore he is entitled to have orders made in respect of him under the Summary Jurisdiction (Married Women) Act, 1895.

Cur. adv. vult.

May 20. LORD MERRIMAN P. read the written judgment of the court. He stated the facts, and said that the court was satisfied as to the welfare of the child. His Lordship continued : We are confronted here with two separate points, one of which is of importance both to the jurisdiction of this division and to the jurisdiction of magistrates' courts with regard to custody, while the other affects only the jurisdiction of magistrates' courts. The first point is whether *Bednall v. Bednall* (3), *Green v. Green* (4) and *Jones v. Jones* (5), were rightly decided. It was held in these cases that the Divorce Court has no jurisdiction under s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, to deal with the custody of a legitimated child as being " a child, the marriage of whose parents is the subject of the

(1) [1946] P. 31.

(2) [1940] Ch. 475.

(3) [1927] P. 225.

(4) [1929] P. 101.

(5) 45 T. L. R. 292.

"proceedings," unless and until a formal declaration of legitimacy by virtue of the Legitimacy Act, 1926, had been obtained. Manifestly, if these cases were rightly decided in relation to the words used in s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, the absence of such a declaration of legitimacy would be equally fatal to the jurisdiction to treat a legitimated child as "a child of the marriage" within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. This point, therefore, affects both jurisdictions.

The second point is whether, even if these cases are held to be wrongly decided and Denning J.'s decision in *M. v. M.* (1) is held to be right, it would still be impossible to hold that a legitimated child is "a child of the marriage" within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, although he is "a child of the parents whose marriage is the subject of the proceedings" within the meaning of s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925.

This brings us to the question whether *Bednall v. Bednall* (2) and the cases following it, or *M. v. M.* (1) were rightly decided. We do not think it necessary to examine the cases referred to by Denning J. in which legitimacy was in issue otherwise than in connexion with divorce proceedings, but some assistance may, perhaps, be derived from *Evans v. Evans* (3). This was a petition for variation of settlements after a decree of dissolution of marriage where a child had been born between the date of the decree nisi and the date of the decree absolute, whose paternity was hotly contested by the petitioner. Before deciding the question of the variation of settlements Gorell Barnes J. directed an issue to be tried to ascertain the status of the child. It is true that this was not a decision on the question of custody but on a separate petition for what is now dealt with as ancillary relief on the main petition, and that the child was made a party to the proceedings. But it is clear that the learned judge did not think it necessary to invoke the procedure under the Legitimacy Declaration Act, 1858, and the Attorney-General was not made a respondent as is prescribed by s. 6 of that Act (now s. 188, sub-s. 4, of the Supreme Court of Judicature (Consolidation) Act, 1925), as a condition precedent to dealing with the matter. In

(1) [1946] P. 31.

(2) [1927] P. 225.

(3) [1904] P. 274.

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M. v. M. (1) Denning J. placed great reliance on the decision of the Court of Appeal in *Langworthy v. Langworthy* (2), which is referred to as showing that the test under s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, is "parenthood, not legitimacy." That case established that a child of the union who is rendered illegitimate by the annulment of the marriage can be dealt with under s. 193, for the very reason, as is pointed out by Cotton and Fry L.JJ. (3), that the section expressly refers to nullity proceedings. But in relation to proceedings for divorce, at any rate, we think that to say that parenthood, not legitimacy, is the test, goes too far. It cannot, in our opinion, be suggested that although the parenthood is undisputed, an illegitimate child who cannot be legitimated is the subject of custody proceedings under s. 193, on the divorce of the spouses who are, in fact, his parents. But we agree with Denning J. that the fact that the wording of s. 193 is wide enough to cover the case of a child of the union rendered illegitimate by the annulment of the marriage of his parents, tends to support the view that in divorce proceedings it is also wide enough to include a child who has been rendered legitimate.

We recognize the inconvenience of upsetting the practice of this division in regard to legitimated children, which has prevailed for nearly twenty years, and is based on the authority of cases in two of which the Attorney-General appeared to assist the court. But this court is not bound by these decisions, and if we think that they were wrongly decided we are bound to say so. In our opinion they were wrongly decided, and the decision of Denning J. in *M. v. M.* (1) was right. Our reasons, which are substantially those which prevailed with Denning J., can be stated quite shortly. In a divorce suit, although the welfare of the child is the paramount consideration, the question of custody is an issue between the parents (*Thomasset v. Thomasset*, per Lindley L.J. (4)) ; provided the other conditions are fulfilled it is the subsequent marriage of his parents which renders the child legitimate by virtue of the Legitimacy Act, 1926 ; and it is that same marriage of those parents which is the subject of the proceedings in which the custody order is sought to be made. In our opinion s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, gives the court jurisdiction in such a case, and a decree of legitimacy under s. 188 of the Supreme Court of Judicature (Consolidation) Act,

(1) [1946] P. 31, 33.

(2) (1886) 11 P. D. 85.

(3) *Ibid.* 89.

(4) [1894] P. 295, 301.

1925, is not a condition precedent to the exercise of that jurisdiction.

As regards the second point, the most formidable argument in support of the contention that a legitimated child should not be regarded as "a child of the marriage" is derived from Farwell J.'s judgment in the case of *In re Wicks' Marriage Settlement* (1). This was a case of a special character arising on the construction of a particular ante-nuptial settlement. In 1893 when the marriage settlement was executed and the marriage took place, there was in existence an illegitimate child of the spouses. The settlement contained power to appoint, after the life interest of the wife, to any one or more of the issue of the spouses as the husband should by deed, will or codicil, appoint. It goes without saying that there was at that time no question in this country of the legitimation by the marriage of the illegitimate child, and he would not be included in the accepted interpretation of the word "issue" when the settlement was made. After the death of the wife, and at a time when the question whether the child born before the date of the marriage was a permissible object of the power of appointment given to the husband, or was entitled to a share of the trust fund in default of appointment, was still sub judice, the husband by deed appointed the whole of the trust fund to that child, although there were alive legitimate issue of the marriage who had a vested interest in the trusts subject to the divesting of any one or more of them by a permissible exercise of the power of appointment. In these circumstances, Farwell J. held, on the construction of this instrument, that the legitimated child was not a proper object of the power of appointment under this deed, notwithstanding the effect of the Legitimacy Act, 1926, and held that although he was "legitimate" by virtue of the use of that word in the Legitimacy Act, he was not a child of the marriage. At the outset of his judgment the learned judge said (2): "It cannot, in my judgment, be true to say that the defendant Lionel Arthur Wicks was a child of the marriage; he is a legitimate child of the spouses, but he is not a child of the marriage, because in fact he was born before his parents were married." In common parlance it is difficult to draw any distinction between such phrases as "a legitimate child," "a legitimate child of the spouses," "a child born in lawful wedlock," or "a child of the marriage." It seems to us that they are synonymous

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(1) [1940] Ch. 475.

(2) Ibid. 477-8.

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terms. Parliament can alter the status of a child, but it cannot alter the chronological order of events. That is to say, legitimation by virtue of the Act of 1926 can, as a matter of history, merely be notional. It is not to be expected that Parliament will employ more than one of several synonymous terms, in the alternative, to express its meaning. When, therefore, in s. 1 of the Legitimacy Act, 1926, Parliament enacts that in the case of a living illegitimate person whose parents marry or have married one another either before or after the commencement of the Act, the father being at the time of the marriage domiciled in England or Wales, the marriage shall render that person legitimate from whichever is the later of the two dates, it is difficult to see why, by the same process, that person is not also "rendered" a child born in lawful wedlock, or a child of the marriage. Parliament, by the very use of the words "rendered legitimate," recognizes that it is a notional process, and it seems to us that there is no reason, except the fact that Parliament has used one synonym rather than another to express the same notion, for holding that the historical fact that the person was born before his parents were married prevents him from acquiring the same status in whatever form of words it is described. It may be that the decision in this case can be supported upon the construction of the particular instrument, but in our opinion it does not oblige us to hold that a legitimated child is not a child of the marriage within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts.

Another argument was based on the operation of s. 6, sub-s. 2, of the Legitimacy Act, 1926, upon the Widows, Orphans and Old Age Contributory Pensions Act, 1925. Under the latter Act the pensionable rights of widows becoming such after the coming into force of the Act, depend by s. 3, among other things, on there having been at least one child of the marriage, and the same applies by virtue of s. 18, sub-s. (c) to the entitlement of widows existing when the Act came into force. By s. 44, sub-s. 1, of the Act, a child includes, in certain conditions, an illegitimate child. It was necessary, therefore, to make clear the position of a legitimated child. Accordingly, sub-s. 4 of the same section enacts that where a child born before the marriage of his parents has been legitimated by virtue of the subsequent marriage of his parents, the child shall, for the purposes of this Act, be "deemed" to be a child born of the marriage. Now at that time the Legitimacy Act, 1926, had not come into existence, but the Widows, Orphans and Old

Age Contributory Pensions Act applied to Scotland. It is reasonably clear, therefore, that this last sub-section was intended to deal with the established law of Scotland on this subject. But similar wording is used in this connexion in s. 6, sub-s. 2, of the Legitimacy Act, 1926, and it is argued that by specifically enacting that for certain purposes a legitimated child should be "deemed" to be a child of the marriage, Parliament was recognizing that the child was not in fact "a child of the marriage." This argument no doubt has force in relation to the combined effect of the Widows, Orphans and Old Age Contributory Pensions Act, 1925, and the Legitimacy Act, 1926; but again, we find it difficult to distinguish between the process of "rendering legitimate" contrary to historical fact, and "deeming" the child to be legitimate. Both alike seem to us to be notional processes. However that may be, we are of opinion that it would be wrong to infer from the absence in the Legitimacy Act, 1926, of any similar provision in relation to the Summary Jurisdiction (Separation and Maintenance) Acts, that Parliament intended to declare that, for the purposes of those Acts, a legitimated child was not a child of the marriage. For these reasons we are of opinion that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *J. A. H. Powell, Law Society, Services Divorce Department; the Official Solicitor.*

J. B. G.

Distinguished. ED-
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[1951] P. 228

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July 31;
Oct. 14, 21.

Divorce — Practice — Decree absolute — Certificate of decree obtained by guilty party — Certificate set aside — Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 9 — Matrimonial Causes Rules, 1947 (St. R. & O. 1947, No. 523/L. 9), r. 40.

Barnard J.

The party in a divorce suit against whom a decree nisi had been pronounced made application through his solicitors to the divorce registry and obtained a certificate under the seal of the registry that the said decree nisi was made absolute. This application by the guilty party was made in disregard of s. 9 of the Matrimonial Causes Act, 1937, being made before the expiration of three months from the earliest date on which the party who had obtained the decree could have made application for the decree to be made

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absolute. In addition the provisions of sub-r. 3 of r. 40 of the Matrimonial Causes Rules, 1947, were not complied with :—

Held, that the decree absolute must be treated as a nullity and the certificate stating that the decree nisi had been made absolute must be set aside : for assuming that the failure to comply with the procedure promulgated in the rules was no more than an irregularity which would have made the decree voidable only, the failure to comply with the provision of the statute made it void.

MOTION to show cause why a decree absolute should not be treated as a nullity.

The parties were married in 1936 and lived in Lancashire, and a petition, dated November, 1946, was filed in the Manchester registry by the husband who thereby asked for relief on the ground of desertion by the wife. The wife by her answer denied the allegation and prayed for a decree on the grounds of cruelty and desertion by the husband. On May 5, 1947, the husband's petition was dismissed and the wife was granted a decree nisi on the ground of desertion. On June 24, 1947, the husband's solicitors obtained a certificate from the registry in the form prescribed by Form 16 (certificate of making decree nisi absolute (divorce)) in appendix II of the Rules. It was thereby stated : " . . . the marriage . . . be " dissolved by reason that since the celebration thereof the " petitioner had deserted the respondent without cause for a " period of at least three years . . . " No notice of the application on the part of the husband for such certificate was given to the wife, the respondent in the suit. The respondent had delayed her own application pending the settlement of certain maintenance proceedings. On July 10, 1947, the petitioner went through a ceremony of marriage with another woman.

Roland Adams for the wife, in support of the application. Dissolution of marriage is entirely a creature of statute : s. 183 of the Supreme Court of Judicature (Consolidation) Act, 1925, regulates the making of decrees ; that section derives from s. 7 of the Matrimonial Causes Act, 1860. The manner in which decrees nisi are made absolute is prescribed not by statute but by the Matrimonial Causes Rules, 1947, r. 40 (1),

(1) Matrimonial Causes Rules, 1947, r. 40 (as in force up to October 1, 1947) : " (1.) An " application by a spouse to make " absolute a decree nisi pronounced	" in his favour shall be made " by lodging in the registry where " the cause is proceeding a notice " of application in accordance " with Form 14 on any day after
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and a decree nisi cannot become absolute otherwise than in the manner prescribed by that rule. The filing of the notice takes the place of the pronouncing of the decree absolute by the lips of a judge which was necessary before May 1, 1947; and the uttering by the registry of the certificate referred to in sub-r. 4 of r. 40 is a mere ministerial act which does not affect status (*Crosland v. Crosland* (1) was referred to). In the present case the notice filed was not a notice contemplated by the rule. The steps prescribed by sub-r. 3 were not taken, and it was not competent for the husband as the party against whom the decree had been pronounced to take those steps until the three months required by s. 9 of the Matrimonial Causes Act, 1937 (2), had elapsed.

"the expiration of the period prescribed for making such decree absolute. The registrar having searched the court minutes and being satisfied that no appeal against the said decree is pending, that no appearance has been entered, or any affidavits have been filed by or on behalf of any person wishing to show cause against the decree being made absolute, the notice shall be filed :

"Provided that if the application is made after the expiration of one year from the date of the decree nisi there shall be lodged with the notice an affidavit by the applicant accounting for the delay and the notice shall not be filed without the leave of the registrar.

"(2.) Upon the filing of the said notice the decree nisi shall become absolute.

"(3.) An application by a spouse to make absolute a decree nisi pronounced against him shall be by summons to the registrar, accompanied by a notice of application in Form 14, on not less than four days' notice. On any such application the registrar may make such order as he thinks fit, or may refer the application to the judge.

"(4.) A certificate in accordance with Form 15 or Form 16, whichever is appropriate, that the decree has been made absolute shall be prepared and filed by the registrar. The certificate shall be authenticated by fixing thereto the seal of the registry.

(1) [1947] P. 12.

(2) Matrimonial Causes Act, 1937, s. 9: "Section 183 of the principal Act shall be amended by adding thereto a subsection as follows:—

"(3.) Where a decree nisi has been obtained, whether before or after the passing of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree nisi been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit."

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In these circumstances there was no decree absolute in this suit: anything purporting to have been done so as to entitle the registry to prepare and file the certificate mentioned in r. 40, sub-r. 4, is a nullity and the certificate ought to be set aside. The respondent is entitled to be made absolutely certain as to her status. Counsel referred to *Craig v. Kanssen* (1) and *McPherson v. McPherson* (2).

Hugh Mais (with him *Roger Willis*) for the husband. It is admitted that there was a failure to comply with r. 40. This failure was due to mistake or misapprehension and no suggestion of bad faith is made. Application was made by completing Form 14 and thereupon a certificate in accordance with Form 16 and r. 40, sub-r. 4, was duly prepared and filed by the registrar. It is demonstrated that there was no misapprehension as to the fact that the party applying was in fact the guilty party.

By R. S. C. Or. 70, r. 1, non-compliance with a rule of procedure does not render the proceedings void. There is a discretion in the court and the breach may be waived or steps taken to remedy the defect if the court is satisfied that substantial justice so requires. Although *Craig v. Kanssen* (1) must be considered, reliance is placed on *McPherson v. McPherson* (2), where in the circumstances a decree absolute was held voidable, not void. Here the decree absolute was duly authenticated and prima facie was valid. The husband relying on the validity of the decree has married again and he and the lady concerned were entitled to rely on the protection of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 184. It is submitted that at the most the decree absolute here is voidable and that having regard to the change of status of the husband and the innocent third party with whom he has gone through a ceremony of marriage, it would be inequitable to avoid it.

Roland Adams in reply. *McPherson v. McPherson* (2) is not precisely in point. What has been done here is not a mere irregularity, for the statute has not been effectively resorted to or complied with.

Cur. adv. vult.

Oct. 31. BARNARD J. This is a motion by Phyllis Woolfenden (or Clegg) asking the court to treat the making of a decree absolute as a nullity and to set aside a certificate under the seal of the registry, dated June 24, 1947, that such decree was made absolute on that date.

(1) [1943] K. B. 256.

(2) [1936] A. C. 177.

On May 5, 1947, the applicant, who was the respondent in a divorce suit, obtained a decree nisi on her answer, the court being satisfied on the evidence that her husband, Ernest Woolfenden (or Clegg), the petitioner in the suit, had deserted her without cause for a period of at least three years immediately preceding the presentation of her answer.

Under the new divorce rules which came into effect on May 1, 1947, the final decree of divorce is no longer pronounced in open court, and r. 40 now provides for the procedure necessary for a decree nisi to become absolute.

In the case before me it was the husband petitioner, the spouse against whom the decree nisi was pronounced, who applied for the decree to be made absolute; and his application, which is dated June 24, 1947, and is in the usual form (1), reads as follows: "We, C. H. Simpson & Simpson, of 1, Cooper Street, Manchester, in the County of Lancaster solicitors for the petitioner give notice that application is hereby made on behalf of the petitioner that the decree nisi pronounced in this cause on the 5th day of May, 1947, be made absolute. I certify that no notice of appeal has been served on me or the petitioner. Dated the 24th day of June, 1947."

Sub-r. 1 and 2 of divorce r. 40 clearly do not apply to the present case, because it was the unsuccessful party who had made the application; and sub-r. 3, which deals with an application to be made by a spouse against whom a decree has been pronounced, has clearly not been complied with, because sub-r. 3 makes it clear that there must be a summons returnable before the registrar, and there was no summons in the present case and no notice whatever was served on the respondent wife. Therefore, quite clearly, the divorce rule has not been complied with.

The matter, however, does not rest there. Until the passing of the Matrimonial Causes Act, 1937, a party against whom a decree nisi had been pronounced could not under any circumstances apply to have the decree made absolute and it was only s. 9 of that Act which made such a step possible. Divorce r. 40, sub-r. 3, merely regulates the procedure by which the guilty party is enabled to apply for the decree to be made absolute under the statute.

It is obvious from the date of the certificate of the decree absolute in the case before me that the time required by the

(1) Form 14 of Appendix II. of the Rules.

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statute had not elapsed to enable the guilty party to apply under divorce r. 40, sub-r. 3, to the court for the decree to be made absolute. I am glad to say that on the affidavit evidence before me I am satisfied that the petitioner's solicitors acted in ignorance and that there is no question here of any fraud being perpetrated on the court.

Counsel for the petitioner has asked me to allow the decree absolute to stand on the ground that there has only been an irregularity in procedure which the court is entitled to overlook, and he has referred me to *McPherson v. McPherson* (1). In that case, which was an appeal from the Supreme Court of Alberta to the Privy Council, the judge who heard the divorce action inadvertently heard the action in private, and the Privy Council came to the conclusion that, although there had been an irregularity in procedure, the decrees in question were voidable only and not void and that the time for avoiding them had long gone by. I have also been referred, by counsel for the wife, to *Craig v. Kanssen* (2), which seems to me to be a case more in point. In that case it was held that "failure to serve" process where service of process is required renders null and "void an order made against the party who should have been" served. The court can set aside such an order in its inherent "jurisdiction and it is not necessary to appeal from it." Lord Greene, after citing a number of authorities, stated in the course of his judgment (3): "Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiæ* to have it set aside."

In view of the fact that the husband has not complied with the statute, I have come to the conclusion that I cannot treat the making of this decree absolute as a mere irregularity, and I must treat it as a nullity. I regret having to come to this conclusion, because I am informed that on July 10, 1947, the husband went through a ceremony of marriage with another woman. The certificate, dated June 24, 1947, to the effect that the decree was on that date made final and absolute must therefore be set aside.

*Application allowed
and certificate set aside.*

Solicitors: *Haslewood Hare & Co., agents for Aston, Harwood, San Garde & Green, Manchester for the applicant; C. H. Simpson & Simpson, Manchester, for the husband.*

(1) [1936] A. C. 177.

(3) Ibid. 262.

(2) [1943] K. B. 256.

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Affirmed. H.L. [1949] 1 All E.R. 294.

Affirmed. TYNE
COMMRs. v. ARME-
MENT ANVERSOIS.
[1949] A. C. 328

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Shipping — Harbour authority — Wreck removal — Recovery of cost — Foreign shipowner not within the jurisdiction — Crown and their agents co-defendants in respect of cargo liability — Foreign shipowner a "proper party" — Crown prerogatives — Action against Crown "not properly brought" — Service of notice of writ on foreign shipowner — R. S. C. Or. XI, r. 1 (g).

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June 9, 10,
11, 12, 13;
July 16.

Scott,
Lucknill
and
Wrottesley L.JJ.

On March 14, 1942, the steamship *Brabo*, belonging to the Arme-ment Anversois Société Anonyme, a Belgian company, sank after collision with another vessel while being towed towards the port of Newcastle-upon-Tyne and became an obstruction to the navigation of that port. The harbour authority, the Tyne Improvement Commissioners, incurred great expense in removing the wrecked hull and the cargo and sought, in the exercise of the statutory powers conferred on them by their several private Acts of Parliament in which were incorporated the Harbours, Docks and Piers Clauses Act, 1847, to recover the expenses of removal from the Belgian shipowners in respect of the ship itself, from the Minister of Supply as the owner of the cargo who was made the second defendant, and from the British Iron and Steel Corporation, Ltd., as the consignees of the cargo, who were made the third defendants. There was no responsible person within the jurisdiction representing the shipowner on whom a writ could be served. On June 6, 1946, Pilcher J. gave leave to serve notice thereof on the shipowners out of the jurisdiction. The shipowners subsequently moved to set aside the order, but Pilcher J. on January 27, 1947, dismissed the motion, holding that the shipowners were proper parties to the action and that the action was properly brought against the Minister of Supply, and against the British Iron and Steel Corporation, Ltd., within the meaning of Or. XI, r. 1 (g).

On Appeal, *Held*, that the foreign owners of the *Brabo* although they were not within the jurisdiction were proper parties in an action for recovery of their proportion of the cost of the wreck removal, but the Minister of Supply, whose rights and liabilities were vested in him by virtue of the Ministry of Supply Act, 1939, with which were incorporated certain material provisions of the War Department Stores Act, 1867, was the agent of the Crown in respect of the cargo, and the British Iron and Steel Corporation, Ltd., the consignees, were merely the agents of the Minister. By those enactments the Minister, and therefore his agents, were entitled to rely on all the privileges and immunity which inhered in the Crown; and both by the express provisions of the plaintiffs' private Acts and of the Harbours, Docks and Piers Clauses Act, 1847, incorporated therewith, the rights, privileges and prerogatives of the Crown were specifically preserved. It was therefore apparent that the Plaintiffs' claim could not succeed against the Minister or his agents and consequently the action was

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not "properly brought" against them within the true meaning of R. S. C. Or. XI. r. 1 (g) and the plaintiffs were disentitled to issue a concurrent writ and to serve notice on the foreigner out of the jurisdiction.

Minister of Supply v. British Thomson-Houston Co., Ltd. [1943] K. B. 478 referred to and distinguished.

APPEAL from the decision of Pilcher J. dismissing a motion to set aside an ex parte order giving leave to issue a concurrent writ against foreign shipowners out of the jurisdiction, as the first defendants, and to serve notice of the writ on them out of the jurisdiction.

The facts, which were not in dispute, are, for the purpose of this report, sufficiently set out in the headnote. The first defendants appealed.

Willink K.C. and *A. A. Mocatta* for the appellants. The decision of the judge was wrong and the appeal ought to be allowed. He found that there is no right of relief as against the Minister of Supply or the British Iron and Steel Corporation, but that there is a plausible cause of action against them, that the first defendants are "necessary and proper parties" to the action, which is "properly brought" and that therefore the Belgian company ought to be brought within the jurisdiction. If no relief can be obtained against the defendants within the jurisdiction it cannot be that by making them defendants, a foreigner can be brought within the jurisdiction as a co-defendant. There must be a cause of action against the defendant within the jurisdiction which may succeed against him. A plausible action ceases to be plausible when no relief can be obtained. The judge considered the question and the rule as if it were separable and divisible. Order XI, r. 1 (g) (1) should be considered as a whole. Some parts of sub-r. (g) are different from sub-rr. (a) and (b); sub-r. (g) is of a very special character; the spirit of it has to be considered in connexion with the whole. The words "properly brought" do not mean brought with proper moral motive. The judge found that the foreign shipowners were "necessary and proper parties" to this action. It seemed impossible to grasp that a

(1) Order XI., r. 1: "Service out	" person out of the jurisdiction is a
" of the jurisdiction of a writ of	" necessary or proper party to an
" summons or notice of a writ of	" action properly brought against
" summons may be allowed by the	" some other person duly served
" court or a judge whenever-(g) Any	" within the jurisdiction."

party is a "proper party" in an action which is not maintainable against the other defendants. He came to the conclusion that the question before him was one that could not be decided *at this stage* and said that there may be certain matters for the decision of a higher tribunal.

[Scott L.J. You cannot try an action which has not been heard.]

[Wrottesley L.J. "Necessary and proper party" means that a plaintiff cannot get judgment unless a certain party is found.]

Whether a point of law is difficult or easy is not an accurate test for the joinder of a foreigner. I ask the court to assume that there is no right to relief against the second and third defendants hypothetically. Reference was made to Dicey's Conflict of Laws, 5th ed., r. 60, p. 238 and note to comment at p. 239 and exception 8 at p. 258.

There is no authoritative case where the court, being of the opinion that there was no chance in law or fact of success in an action against defendants within the jurisdiction, has granted leave to issue a writ or to serve a writ on a foreigner not within the jurisdiction. He referred to *Massey v. Heynes* (1); *Flower v. Rose* (2); *Witted v. Galbraith* (3). The second and third defendants can rely on the defence that the Crown is not bound by a statute unless the Crown is bound expressly or by necessary implication. The statutes in question here expressly preserve the rights of the Crown. It is only against the "owners" of the cargo that the respondents can recover. Special definitions are not applicable in these circumstances and the definitions do not bring them in. The position of the Crown is defined in the following cases: *Hornsey U.D.C. v. Hennell* (4); *Commissioners of Works v. Pontypridd Masonic Hall* (5); *Chare v. Hart* (6); *Att.-Gen. v. Hancock* (7); *Minister of Supply v. British Thomson-Houston Co., Ltd.* (8). The judge did not appreciate the relevance of the last mentioned case to the matter before him but he seemed to attach great importance to it. That case has really nothing to do with the case here. All the Court of Appeal decided was a procedural point; no other aspect of the Minister of Supply's rights was changed. All the rights and privileges of the Crown were

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(1) [1888] 21 Q. B. D. 330.

(2) (1891) 7 T. L. R. 280.

(3) [1893] 1 Q. B. 577.

(4) [1902] 2 K. B. 73.

(5) [1920] 2 K. B. 233.

(6) (1919) 88 L. J. (K. B.) 833.

(7) [1940] 1 K. B. 427.

(8) [1943] K. B. 478.

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preserved by the Ministry of Supply Act, 1939. These proceedings are based on statute and therefore cannot bind the Crown. Having reached that view the judge should have gone on to set aside the service of the writ in question on a person outside the jurisdiction. It is only against the owner of the cargo that the harbour authority can recover. The Crown as excepted from any liability under the Harbours, Docks and Piers Clauses Act, 1847. On the construction of the words "necessary or proper parties" see *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* (1), *Ellinger v. Guinness, Mahon & Co., Ltd.* (2). Assuming that the privileges of the Crown are not open to the Minister of Supply and the British Iron and Steel Corporation they are not persons against whom the expenses incurred here can be claimed because they are not the "owners" of the cargo in either the ordinary or special sense (See the Harbours, Docks and Piers Clauses Act, 1847, the Removal of Wrecks Act, 1877 and the several Tyne Improvement Acts, 1861-1890). The extension of the Commissioners' powers originated with respect to rates and dues as affecting consignor, consignee, broker, etc., of goods. It was wrong for the judge to divide sub-order (g) of Or. XI., r. 1, into two parts. He was right to consider it but ought to have gone on to decide it.

K. S. Carpmael K.C. and *A. J. Hodgson* for the respondents. The fact that there may be a good defence to the action does not prevent the action from being a perfectly good cause of action. The judge below was inclined against me but exercised his discretion in my favour and it would be wrong to upset a decision rightly based on his discretion. The defences urged by counsel for the appellants were not relevant at this stage of the proceedings; counsel for the appellants is "jumping the gate before he comes to it"; the defences which may be open to the second and third defendants at the trial ought not to be looked at before the trial of the action. Mr. Willink does not appear for the Crown yet he has submitted arguments as if he does. He accepts the view that this was a perfectly good claim unless the defences open to the Crown were taken. The Crown is not bound to plead quite a number of statutes. The Minister of Supply Act, 1939, in its terms give the right to the Minister to buy or acquire certain things and the property in the goods vested in the Minister. The effect of St. R. & O. 1939, No. 877, is to make the Minister the owner of

(1) [1916] 2 A. C. 298.

(2) [1939] 4 All E. R. 16.

the goods, and he can sue or defend in relation to any goods so vested in him. In all the cases cited by counsel for the appellants there was some device in which it was sought to bring a person not within the jurisdiction, i.e., a foreign defendant, before the courts of this country. The whole facts of this case happened within this jurisdiction: the ship came here, came voluntarily and sank here causing an obstruction which has cost a large sum of money to remove. One of the tests is that if the foreigner whom it is proposed to make a defendant were resident here, would it have been a proper service on all three? I submit that it would. There may be several defences but it does not necessarily follow that the second and third defendants would take them. If counsel for the appellants concedes that, it goes to the whole root of the matter and he has not established that the plaintiffs have not a good cause of action, the onus of which is on him. The Crown may decide not to take the defences open to it for various reasons, for instance, public policy. There is a distinction between possible defences and ascertained defences.

[Wrottesley L.J. referred to the rules laid down by Farwell L.J. in *The Hagen* (1), namely, that the court ought to be very careful before it allows a writ to be served out of the jurisdiction; if there is any doubt that the case comes within the order the doubt should be resolved in favour of the foreigner; and that full and fair disclosure must be made by the party making the original ex parte application. You must be frank with the court under the third of those.]

[Scott L.J.: The gist of the case is stated there.]

This was a contract or quasi-contract, a specialty debt owed by the ship and cargo to the Tyne Commissioners because the ship, in a sinking condition, sought refuge within the harbour. The doctrine that the King can do no wrong does not apply. There were many instances where the Crown does not assert its rights; e.g., collisions between privately-owned ships and H.M. ships where the Crown waives its privileges.

[Scott L.J.: Questions of tort seem to me to have nothing to do with this case.]

[Bucknill L.J.: Must not the Crown take all possible defences open to it in the interest of the taxpayer?] If the Tyne Commissioners do not recover from the foreign shipowners the expense of removing the obstruction (some 250,000*l.*) must eventually fall on some sections of the public in any case in the

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form of rates, etc. Counsel referred to the several private Acts of the Tyne Improvement Commission and, in particular, to the Act of 1890, s. 3; the Wreck Removal Act, 1877; the Harbours Docks and Piers Clauses Act, 1847; and the Merchant Shipping Act, 1894, ss. 530 and 532. The plaintiffs are entitled to sue the Minister and the British Iron and Steel Corporation as owners of the cargo within the statutory definition of "owner" in the special Tyne Acts, but they do not seek to show that the property in the goods is not ultimately in the Crown. There can be two owners at the same time in certain circumstances. The third defendants are the consignees named in the bill of lading and the plaintiffs could sue them under their special Acts and as designated by Parliament within the definition of "owners." It has not been shown that the discretion of the judge below was wrongly exercised. There is no question but that the first defendants are "necessary or proper" parties to this action. (See *Massey v. Haynes* (1).) Here the Minister is made a principal under the Ministry of Supply Act, 1939. The property in the goods in question laden on the *Brabo* was vested in the Minister as principal, and as such he could sue or defend in respect of those goods in an action arising in this way; he retained the ordinary procedural remedies or privileges of the Crown by the proviso to s. 20 of the War Stores Act, 1867, such as those stated by the Lords Justices in *Minister of Supply v. British Thomson-Houston Co., Ltd.* (2); but not the privilege of the Crown "not to be bound." I rely on that case. It dealt with the point in issue here. The property in goods is vested in the Minister and with that property the Minister incurs the responsibilities which attach to the ownership of the goods. Counsel referred to *Russell & Co., Ltd. v. Cayzer, Irvine & Co. Ltd.* (3); *Minister of Works v. Henderson* (4); *Graham v. Public Works Commissioners* (5); *Commissioners of Public Works v. Pontypridd Masonic Hall* (6). The sole question here is whether the action is properly brought against the Minister and the British Iron and Steel Corporation. There is no suggestion that the writ is defective or was issued mala fide, or is action barred against the Belgian company, i.e., *res judicata*. The action is properly brought and reasonably arguable on an issue of fact or law; there is, at least, an arguable point of law. It would be improper to decide at this

(1) (1888) 21 Q. B. D. 330.

(2) [1943] K. B. 478.

(3) [1916] 2 A. C. 298.

(4) [1947] K. B. 91.

(5) [1901] 2 K. B. 781.

(6) [1920] 2 K. B. 233.

stage the point argued on behalf of the appellants. The Minister is the principal and not merely the Crown agent ; the Crown as principal has disappeared and with this disappearance has gone the Crown immunity.

Willink K.C. in reply.

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Cur. adv. vult.

July 16. SCOTT L.J. read the judgment of the court. After stating the facts his Lordship continued : The various circumstances in which the courts of this country will compel a person resident in a foreign country to come over here and answer in proceedings are to be found in Or. XI. For the most part the cases set out in the rule are self-explanatory, for instance, where the subject-matter is land in this country. But sub-heading (g) varies in kind from the other cases, since the test is whether the person sought to be served and so made amenable to process in this country, although resident abroad, is a necessary or a proper party to an action properly brought against a person duly served in this country. But to all cases alike the three rules laid down by Farwell L.J. in *The Hagen* (1) apply. The first of these rules is that the court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction. The second is that, if there is any doubt whether the case comes within the order, the doubt must be resolved in favour of the foreigner. And the third is that full and fair disclosure must be made by the party making the original ex parte application, and failure to make it is a reason for discharging the order, while leaving the party free to apply again subsequently. And while the courts of this country have made it clear that they will not try the action when called on to decide whether or not to grant leave to serve the writ, yet they never refuse to hear what the defendant, whom it is proposed to serve, has to say when he enters, as in this case, a conditional appearance, and moves to set aside the service of the writ on the ground that the facts do not bring the case within the terms of the Order. As Lord Sumner said in *John Russell & Co. v. Cayzer, Irvine & Co., Ltd.* (2) : "The words 'properly brought' enure to the protection of the person out of the jurisdiction whom it is proposed to serve with process."

In the case now before us it was argued by Mr. Carpmael, on behalf of the plaintiffs, that the second and third defendants might waive any defence that was open to them. To permit the

(1) [1908] P. 201.

(2) [1916] 2 A. C. 298, 304.

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possibility of such a waiver to influence our decision in this case would be contrary to the spirit of the decision of the House of Lords in the above case, where the fact that one of the defendants resident abroad had submitted to the jurisdiction of the English court was held not to establish that the action had been properly brought so as to enable a foreign defendant to be served with the writ. It seems to us that the duty is always on the court to see whether the action is properly brought, and that an action is not properly brought when the facts are all admitted and there is no question of foreign law, and on those facts it is apparent that the plaintiffs cannot succeed against the defendants served within the jurisdiction. In this particular case we think that it is clear that the court should be specially careful before allowing the writ to be served on the foreign defendant. We were informed that the ship was about 3,700 tons gross register, and it appears from the judgment of Pilcher J. that the expense involved in salving what could be salvaged and in removing the obstruction will amount to some 250,000*l.* Service of the writ on the foreign defendant may result in a tremendous financial liability on an entirely innocent shipowner. Inasmuch as the plaintiffs' claims against ship and cargo interests arise out of the same set of circumstances, namely, the sinking of the ship in a position where she and her cargo constituted an obstruction to the harbour, necessitating the removal operations of the plaintiffs, it seems clear to us that the owners of the ship and cargo would have been properly joined as co-defendants under Or. XVI, r. 4. The test laid down by Lord Esher in *Massey v. Heynes* (1) applies, and we agree with the learned judge that the Belgian company would have been a "proper" party, and therefore, that the first condition precedent of the rule under consideration is satisfied. Whether the Belgian company would have been a necessary party is another question. Prima facie that condition means that without the addition of the foreign party the defendant within the jurisdiction is not, or may not, be liable, but that, with that defendant also before the court, his liability may be established.

The only issue for decision by this court is, therefore, that which arises on the second condition, namely, can the action for the purpose of service out of the jurisdiction be regarded as one that was "properly brought?"

Mr. Willink, on behalf of the Belgian company, conceded

(1) (1888) 21 Q. B. D. 330, 338.

that if the plaintiffs' claim were based on allegations of fact which, although disputed by the defendants, would, if established, entitle them to succeed in the action, the action ought to be treated as "properly brought." In such a case the issues of fact would have to be decided at the trial. But Mr. Willink argued that when all the relevant facts are admitted and none are in dispute, and on the correct view of the law those facts do not entitle the plaintiffs to succeed in their action, then the second condition is not satisfied, the action is not "properly brought," and service out of the jurisdiction on another defendant cannot be allowed. Mr. Carpmael, for the plaintiffs, contended that if there is an arguable question of law which has to be solved before judgment can be given against the existing defendants on the record, it is sufficient to make the action one "properly brought." We agree with Mr. Willink's submissions as to the principles applicable. The learned judge, though disposed to think that in the end the Minister and the corporation would be held free from liability, held that the difficulty of solving that legal problem was enough to allow him in his general discretion to treat the great convenience of having the owners of the ship, as well as the owners of cargo, before the court, as a sufficient reason for allowing service of the writ on the foreign defendants.

We proceed, therefore, to consider the question whether on the admitted facts it can be reasonably argued that the Minister or the corporation are liable to the plaintiffs in this action.

First, we will discuss the legal liability of the Minister. Under the Ministry of Supply Act, 1939, the Minister, thereby created, is given power (s. 2, sub-s. 1) to buy or otherwise acquire etc., "articles required for the public service," which by s. 19 are defined as including such things as made up the cargo of the *Brabo*. Section 2, sub-s. 3, is as follows: "His Majesty may by Order in Council apply in relation to the Minister or property for the time being vested in or under the control of the Minister, with any necessary modifications or adaptations, any of the provisions of the enactments set out in part II of the schedule to this Act." Part II of the schedule includes s. 20 of the War Department Stores Act, 1867, which contains (inter alia) the following provisions: "The Secretary of State for War may institute and prosecute any action, suit, or proceedings, civil or criminal, concerning military or ordnance stores, or other His Majesty's stores under the charge or control of the Secretary of State for War

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 1947 "Secretary of State for War for the use or on account of Her
 THE "Majesty and may defend any action, suit, or proceed-
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 " Provided always as follows :—

" (1.) Nothing herein shall take away or abridge in or in
 "relation to any such action, suit, or proceeding any legal
 "right, privilege, or prerogative of the Crown, and in all such
 "actions, suits, and proceedings, and in all matters and
 "proceedings connected therewith, the Secretary of State
 "for War may exercise and enjoy all such rights, privileges
 "and prerogatives as are for the time being exercised and
 "enjoyed in any proceeding in any Court of Law or Equity
 "by the Crown, as if the Crown were actually a party to such
 "action, suit or proceeding.

" (2.) It shall be lawful for Her Majesty if and when it seems
 "fit, to proceed by information in the Court of Exchequer or
 "by any other Crown process, legal or equitable in any case
 "in which it would have been competent for Her Majesty
 "so to proceed if no provisions respecting procedure has been
 "inserted in this Act."

The power of delegated legislation conferred by that section was duly exercised by St. R. & O. No. 877, so as to put the Minister of Supply in the same statutory position in regard to s. 20 of the Act of 1867 as is occupied by the Secretary of State for War. It is in these words :—

"In s. 20 references to 'the Secretary of State for War' shall be construed as including references to the Minister of Supply and the reference to 'military or ordnance stores' as including a reference to any article belonging to or supplied by or for the purposes of the Minister of Supply."

Prima facie no minister is owner of Crown or government property. He is a mere agent of the Crown. He may be given by statute a right of action as if he were owner of such property—whether real or personal—but that does not make him an owner in fact, or put on him the liabilities attaching to an owner in fact. We cannot read into the Ministry of Supply Act, 1939, an intention to do more in the case of that Minister. Both parts of the *Brabo's* cargo would have come within the expression "military or ordnance stores," even if St. R. & O. No. 877 had never been passed, but the order makes that interpretation doubly clear. Steel bought at that time for war purposes by the British Purchasing Commission on behalf of the

government, and consigned to the corporation as agent of the Minister (as is stated by the affidavit of Mr. Fenwick, and not controverted by any evidence of the plaintiff authority) obviously was so acquired in the war as "ordnance stores"; and the court can have no doubt that the wood-pulp also was. That brings the whole cargo within the terms of s. 20 of the Act of 1867 which in express terms treats all ordnance stores as the property of the Crown, and not of the Minister.

In so far as the question of ownership in the instant case is one of fact, it was conceded by the plaintiffs both below and before us that the whole cargo was "government owned," and the learned judge so held in express terms. His findings on this cardinal point of fact are so definite that they should be quoted: "It was not disputed that the cargo on board the *Brabo* in respect of which some of the plaintiffs' expenses "were incurred, was what is known as 'government owned' "and in that sense the property of the Crown. I had before "me an affidavit sworn by Mr. Fenwick on behalf of the first "defendants in which he states that the Minister of Supply "was dealing with the cargo under the powers conferred upon "him by the Ministry of Supply Act, 1939, and that the British "Iron and Steel Corporation were the consignees named in the "bill of lading covering certain steel billets, the shippers being "the British Purchasing Commission. Mr. Fenwick also said "that the third defendants were acting as agents for the Minister "of Supply and were not themselves the owners of the goods. "There is really no dispute in fact in the present case. Whilst "the second defendant is a Minister of State and the third "defendant a limited liability company, there is no doubt that "the cargo was, to use once again the popular but technically "incorrect expression, 'government owned.' It was conceded "by Mr. Carpmael, who appeared for the plaintiffs, that the "property in the *Brabo's* cargo was in the Crown subject to "any qualification or limitation upon the Crown's proprietary "rights which might properly be inferred from the provisions "of the Ministry of Supply Act, 1939."

It is thus clear beyond doubt that the corporation also was a mere agent acting for the convenience of the Crown in performing ministerial duties such as customs entries in respect of imported steel. It is equally clear that the position of the Minister was not that of "owner" in the natural sense of the word, although the Ministry of Supply Act, 1939, must be scrutinized to see whether its terms require the court to hold that he is thereby made a statutory "owner" in some artificial

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sense for the purpose of the Acts, under which the plaintiff authority was entitled to recover its wreck removal expenses from the "owner." Whether that is so is a question of interpretation of (a) the Ministry of Supply Act, 1939, and (b) the Acts containing the special powers on which the plaintiffs rely.

First, it is necessary to bear in mind the nature of the plaintiffs' claim. It is in respect neither of a contract, express or implied, nor of a tort. It became clear in the course of the hearing here and below that it is based on s. 42 of the plaintiffs' special Act of 1890. The first question that arises, once it is clear that the defendants within the jurisdiction are mere agents of the Crown in respect of goods which were the property of the Crown, is whether the Crown can be regarded as affected by a section which does not either expressly or by necessary implication mention the Crown. The only words which could be relied on for this purpose in the Ministry of Supply Act, 1939, are the words set out above, "and" (the Minister) "may defend" "any action suit or proceeding concerning any such stores, matter or thing as aforesaid." In view of the decision of this court in *Minister of Supply v. British Thomson-Houston Co., Ltd.* (1) it may be that the effect of these words is to confer on the subject, and so on the plaintiffs in this case, the right to bring an action as distinct from a petition of right against the Minister in respect of the cargo of the *Brabo*, and that it is no longer necessary for the plaintiffs to claim against the Crown by name, nor to proceed by petition of right. But beyond this, that section does not go, nor does it, apart from the proviso, deprive the Crown of any defences which otherwise would be open to it. And the proviso to the section makes it doubly clear that though the party sued is not the Crown, but the Minister, yet the Minister has all the privileges and immunity which inhere in the Crown.

Unless, therefore, something can be found in the special Acts of the plaintiffs, or the clauses incorporated with them, to negative what has been said above, the Minister of Supply is no more liable to a claim under the statute on which the plaintiffs sue than he would be for a claim in salvage. There it is well established that salvors of Crown property have no right to claim salvage even by a proceeding in rem. Kennedy on Salvage, 3rd ed., p. 77, states: "No salvage action in rem can be prosecuted against such ships" (i.e., ships belonging to our own or to a foreign sovereign state) "or against stores on

(1) [1943] K. B. 478.

"board of them, even though the ship is engaged in trade," and refers to the speech of Lord Halsbury in *Young v. ss. Scotia* (1), "Where you are dealing with an action in rem for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner, and if the owner is the King the action cannot be maintained, since it is impossible to contend that the King can be impleaded in his own courts."

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His Lordship then reviewed in detail the private Acts of the plaintiffs (which are of no general interest) and, after pointing out that not only did they not purport to bind the Crown, but also expressly preserved all Crown rights, continued:

So far as the second and third defendants are concerned, we have seen that their ownership of the cargo on board the *Brabo* was as agents of the Crown. So here again, since the Crown is not expressly or by necessary implication touched by the plaintiffs' special Acts, the defendants are as free from liability as was, for instance, Lt.-Col. Pearson in *Pearson v. The Assessment Committee of the Holborn Union* (2) which concerned lands purchased for a depot and training ground for the volunteer forces.

The learned judge in the court below appears to have read into the judgments of this court in *Minister of Supply v. British Thomson-Houston Co., Ltd.* (3) a wider scope than that intended by the lords justices, or was germane to their decision. Had the claim in the present action against the Minister of Supply been based on contract to which he was a party, made within the powers conferred on him by statute, different considerations might apply. But in respect of a claim of the kind made here, nothing in the Ministry of Supply Act, 1939, nor in the special Acts of the plaintiffs deprives the Crown, or the Crown agents of any of the legal rights, privileges or prerogatives of the Crown, except that by reason of the Ministry of Supply Act, the Minister (we say nothing of the third defendants) cannot object to a proceeding against him taking the form of an action commenced by a writ, or to a counterclaim against him in an action in which he is plaintiff. It follows that, in our opinion, the appeal must be allowed.

Appeal allowed.

Solicitors for the appellants: *Holman, Fenwick & Willan.*

Solicitors for the respondents: *Bentleys, Stokes & Lowless.*

(1) [1903] A. C. 501, 504.

(3) [1943] K. B. 478.

(2) [1893] 1 Q. B. 389.

H. G.

Affirmed. C.A. [1948] 2 All E.R. 297.

Discussed. PRINCE v. PRINCE [1951] P. 71

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Oct. 14, 15.

Lord Merriman
P. and
Wallington J.

PEEK v. PEEK.

Divorce—Practice—Application to the Divisional Court for re-hearing—Cause heard by judge alone—"Error," or otherwise, of the court—Matrimonial Causes Rules, 1947 (St. R. & O., 523/L.9), r. 36.

It cannot be said that a court is "in error" merely because the judge did not conduct more exhaustive inquiries. An appellate court must decide, as a matter of substance and not of mere form, whether on the one hand a decision is being impeached on the ground that the court below erred on the materials before it, or whether on the other hand it is being impeached on the ground that the court below went wrong, not because of error in its proceedings, but because evidence on a vital matter was concealed from it. It is immaterial whether such a question falls to be decided in an undefended or defended suit.

One of the objects of r. 36, sub-r. 1, of the Matrimonial Causes Rules, 1947, is to enable the Divisional Court to secure as far as possible that there shall be a trial of the real issue between the parties, before permitting an appeal to the Court of Appeal.

At the hearing of a husband's undefended petition for divorce on the ground that his wife had deserted him in 1922 the court had before it (1.) a letter to the court from the respondent, who lived in Australia, in which it was stated that she had been unable to instruct solicitors but that the petitioner had, in fact, deserted her, and (2.) a letter from the respondent written in 1926 showing her resentment at the petitioner's association with a woman and a letter written by the petitioner to his wife in 1945 in which he asked her to divorce him. This correspondence having been considered, the court granted a decree nisi in the exercise of the court's discretion in respect of the petitioner's adultery since 1924. Subsequently to the hearing, further correspondence became available including letters written about the time at which desertion was alleged, namely, 1922, which contained an admission of adultery by the petitioner and indications that he did not wish the respondent to join him. On an application to the Divisional Court made under r. 36, sub-r. 1, of the Matrimonial Causes Rules, 1947 (1) for a re-hearing:—

Held that on the foregoing facts this was a case in which evidence on a vital point had been concealed from the court by the petitioner;

(1) The Matrimonial Causes Rules, 1947, r. 36:

(1.) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division. The application shall be by notice of motion, stating the grounds on which it is based, filed in the

Divorce Registry and served upon the opposite parties within six weeks after judgment. The notice shall be a fourteen days' notice and may be amended at any time by leave of the judge.

(2.) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal.

that there was in consequence no "error of the court at the "hearing"; and that the Divisional Court, having accordingly jurisdiction to deal with the matter, would order a re-hearing.

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APPLICATION for the re-hearing of a cause heard by Barnard J. alone.

By his petition, dated December, 1946, the husband pleaded that his wife had deserted him in 1922, having refused to leave the marital home in Australia when he had obtained employment which would bring him to this country. The petition was served on the respondent in Australia in January, 1947, and the respondent wrote to the Divorce Registry in London a letter in which she stated that she had been unable to instruct solicitors, and that the petitioner had deserted her. In April, 1947, she applied for legal assistance as a poor person, which was finally granted after inquiry on July 2, 1947.

In the meantime, however, the cause was heard as an undefended suit by Barnard J. on June 17, 1947, and taking into consideration the matters within his knowledge that are referred to in the headnote, Barnard J. granted a decree nisi in the exercise of his discretion.

After the respondent had been granted legal aid certain correspondence became available which was later laid before the Divisional Court, the existence of such correspondence not being previously known to the petitioner's counsel or to those advising him. Amongst this correspondence was a telegram to the respondent in 1922, saying "Imperative stay Australia," three hotel bills sent to the respondent by the petitioner in 1922 with a suggestion that she should divorce him on the ground of adultery, a letter from the petitioner to his mother written in 1923 referring to his wife's refusal to take divorce proceedings and to his being compelled to disappear, and other correspondence of a later date indicating an unwillingness on the part of the petitioner to take his wife back.

J. Montgomerie for the wife.

D. Armstead Fairweather for the husband.

LORD MERRIMAN P. This is an application by a wife for a re-hearing of the husband's divorce petition on which Barnard J. pronounced a decree nisi on June 18, 1947. The application is made under r. 36. I must say at the outset that I adhere to what I said at the beginning of my judgment on the

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same topic in *Petty v. Petty* (1). I shall have to refer to that case later, when dealing with the merits. For the moment, I am repeating the determination of this court to avoid any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal. It is only if this court is satisfied that the particular case comes within the rule that it is justified in entertaining an application of this character, though, if it is so satisfied, it ceases to be a matter of discretion, and the court is bound to deal with it, because no other court can deal with it.

In my opinion this is an extremely difficult case. It has troubled me a great deal, and I am much obliged to counsel on both sides for their assistance. Manifestly, on any such application, there are two primary issues: first, should there be a new trial at all, and secondly, if any question of a new trial arises, and this is the point which concerns us, by what court should it be ordered? It will be remembered that the rule speaks of "no error" being "alleged." In my opinion those words must be interpreted in the broad sense. The matter must be considered in the light of the implications involved in what is being asserted, and not of a mere formal disclaimer of attributing any error to the court below. It is a matter of substance and essence, and not of form.

This was, from any point of view, a difficult case for the husband. By his own admission, he had been living in adultery with a woman since 1924. He disclosed that fact in his discretion statement, which also contained the positive assertion that he had not committed any other adultery; but it goes without saying that that admission of adultery not merely raises the question whether discretion should be exercised in his favour: it is a vital fact in connexion with the determination of the question whether his charge of desertion is or is not proved. He started with the burden that it was for him to prove affirmatively, on the lines laid down in *Herod v. Herod* (2), and approved by higher authorities since, that in spite of the facts disclosed in his discretion statement he could assert that during the material three years his wife deserted him, and it was for him to show, incidentally, that her attitude to the whole matter had been such that he could prove his assertion; and then, and only then, does the question of the exercise of the discretion by the court arise. In other words, the facts connected with his own adultery are at least equally material on the main issue as they are on the issue of discretion.

(1) [1943] P. 102.

(2) [1939] P. 11.

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One can put it another way. The question of proof of desertion and the exercise of discretion are separate issues, but in a case like this, if no desertion is proved, by reason, amongst other things, of his own misconduct, then the question of discretion falls to the ground, whereas; on the other hand, if, notwithstanding the history of his own adultery, the court holds that the desertion is proved, it would be extremely unlikely, having so held, that it would refuse to exercise its discretion in respect of the same adultery which it had already held was no bar to the finding of desertion.

This case from its inception was presented by Mr. Fairweather to the court as a case of extreme difficulty. We have read and considered with great care, and with Mr. Fairweather's assistance, every word of the transcript of the case before Barnard J., and I wish to say here and now that that transcript provides a model of the way in which such a case should be presented. It was not merely that every possible fact was brought to the knowledge of the court, but, incidentally, it was an excellent example of advocacy, for the difficulties were faced as fully and frankly as they could be and were overcome. It is true, now, that we know that all the material available was not put before the court, but that was not the fault of counsel or those advising him. I should, of course, in any case accept, without any hesitation, Mr. Fairweather's statement that the material of which we are now aware was not available to him, but, as it happens, it does not depend only on Mr. Fairweather's statement, for we have correspondence between the wife and the senior registrar which shows conclusively that some of this additional material was sent to the court, with a covering statement to which I shall have to allude in a moment, and was returned, with a perfectly proper and correct letter by the senior registrar to the wife, with advice as to the way in which she should proceed, while, in accordance with the invariable practice, the wife's own letter was retained and placed before the learned judge at the trial. It is shown conclusively by that very circumstance that the papers were in the wife's custody, and not in the custody of those instructing the husband's counsel.

I shall have to deal with those papers and what they show later, but I wish to say something first about the wife's own letter, because it raises a question which, speaking for myself, has troubled me in connexion with this submission that no error is alleged. Having said what I have said about the



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presentation of the case by counsel, I need scarcely say that it is plain from the shorthand note that the most careful inquiry was made into this matter by the learned judge, who was quite obviously fully alive, as one would naturally expect, to all the possible implications of what was being put before him. My only criticism is in connexion with this letter. At first, Mr. Fairweather was inclined to object to the learned judge reading the letter, because he did not wish it to be treated as evidence; but he not merely withdrew that objection, he ultimately invited the learned judge to read it. I want to say a word about this, because it is material in this particular case, and may possibly be helpful in others. Of course *ex parte* statements in a letter written by an absent spouse, or, for that matter, by anybody else, cannot possibly be evidence in the case. No one would for a moment suppose that they could be, but it must always be remembered that the court has a duty to inquire for itself into the truth of the allegations made in the petition; and although *ex parte* statements by an absent spouse are no sort of evidence on which to come to a decision, they may be and should be recognized for what they are, namely, pointers to the sort of inquiry which the judge should make. Speaking for myself, I have always adopted the practice of handing such a communication to counsel, and, if necessary, of giving him the opportunity of an adjournment, short or long, to enable him to become fully instructed about the matter; but in most cases I find that counsel has already become apprised of the nature of the communication, either in the course of earlier correspondence between those instructing him and the other spouse or otherwise; but he may be taken by surprise, and in that case an adjournment may be necessary. Then one of two things happens: either the petitioner himself disposes to the satisfaction of the judge of the matters raised and the court can proceed without more ado to pronounce a decree, or things are left in doubt, and some further investigation is called for. The case may, in certain events, be properly sent to the King's Proctor for his assistance in investigating the facts. In my opinion, that is the proper practice in connexion with the consideration of communications of this sort.

My only criticism of the way in which this particular letter was dealt with, is that it seems to me, from an observation of the learned judge, that the full implications, or, at any rate, the possible implications of what was said in that letter were somewhat under-rated. To deal with the point satisfactorily and

to deal with the case as a whole, I must now see what are the real gaps in the case which was presented to Barnard J. I would like first to make this general observation : I think I may say that it is indisputable that there is all the difference in the world, in a desertion case where the petitioner is admitting adultery (and in particular a long course of adultery), between the case in which he has—to use a neutral word—left his wife for another woman or a series of women, and the case in which, having been left or thrown over by his wife, he has taken up an association or formed a connexion with another woman or women. In the case of the man who has left his wife for another woman, and lived in adultery with her ever since, it is sufficient to say that the distinct question of the exercise of discretion is unlikely to arise at all ; whereas in the case of the man who has been left or thrown over by his wife, speaking for myself, I have known many instances in which, being satisfied that the wife was the original deserter, I have held that a proper case for the exercise of the discretion is shown. It is precisely in this connexion (although, as I have already said, without the slightest possibility of reproach to counsel presenting the case or his advisers), that the court was not merely not informed, but, in my opinion, was positively deceived. I am prepared to assume in the husband's favour that at the moment when he left Australia what he was contemplating and wishing was that, being himself compelled to make England his headquarters, and particularly his headquarters for the purposes of leave, his wife and children should leave Australia and come to England. It is quite clear that this matter was considered, in the first instance, from the point of view of domicile, and the learned judge was quite satisfied that the husband had assumed an English domicile of choice. But when the petitioner went on to assert, as he did, that that remained his hope and intention from 1920 until her persistent refusal to come to this country finally broke his heart and he was driven to form this other liaison in 1924, which, be it remembered, he swore was the only adultery which he had ever committed, one sees why it was that on that material, thus presented to him, the learned judge, though plainly after a certain amount of hesitation, was prepared to exercise his discretion.

That brings me to a consideration of the new material, and the implications of the letter to the court, and I must consider how far, if at all, the learned judge was put on his guard by such

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a letter. The material which is now before us, some of which was sent to the registrar and returned to the wife before the hearing, is exhibited to her affidavit. I only propose to read a few short passages, all bearing on the suggestion that this man had deserted her, made up his mind to desert her, and made it quite clear to her that he had done so, long before there was any question of his association with the woman named in his discretion statement. I am not going to read the affidavit itself, which makes the point even clearer; I prefer to rely on the documents, about which there is no dispute. But let me say at once that I am not engaged in deciding whether her case is right. All that I am examining is what was the evidence which was withheld from the learned judge, in her absence, by the petitioner himself. I begin with a letter which is clearly written in 1922 by the husband. In this letter he gives an address in London for her reply, and the first words on the second page, which is the earliest page we have, are these: "Providing I am left alone neither you nor the children will want while I am above ground"—"Providing I am left alone." This is the man who says that his wife had deserted him before he formed this association in 1924. Then he goes on to discuss his future, and his prospects of being able to maintain a particular allowance, and then there occurs, on the same page, this sentence: "Simply ridiculous your saying if I return to you that you will never refer to the past. Not human nature. I could not do it, and no use saying so. I could not be so two-faced." Then he reverts again to the question of money, and continues: "I have been back here six months or more, and have given the matter very serious thought, and no use denying the whole fact, I cannot ever return to you as before. What is the use of playing a double life any longer? Whilst I respect you in every way I do not love you as I should. The children, yes, I do, and I know they are absolutely safe with you." The next letter is dated December 12, 1922, and is written from the office of his firm in London. Enclosed find bills from two hotels, where "I have stayed with a lady." Incidentally, I am quite prepared to accept the assurance that it is not the lady mentioned in the discretion statement. "Should you wish to take proceedings you can get information from these addresses. I again repeat I shall never return to you. Yours, F. J. Peek." The bills enclosed were in respect of visits to one London hotel in March, 1922, a visit which lasted a full week,

and shows that the parties were really in residence at the hotel, and the other two to two visits to another hotel in November and December, 1922; and the first hotel bill, incidentally, helps to fix, or to suggest, the date at which the first undated letter was written, because it will be remembered that he said he had been here (by which I understand he means this country) for about six months, so the letter was probably written about October, 1922. In April, 1923, still a whole year at least before this association with the woman mentioned had started at all, he wrote to his mother a letter which has somehow come into the possession of the wife, in which he says that he had received a letter from the wife saying that on no account would she give the husband his freedom, on account of the mother's sake and the children's sake, and then this sentence follows: "I have therefore decided that since she refuses to take divorce proceedings, that being the only freedom I want, I am compelled, much against my wish, to carry out my intentions, namely, cease sending remittances and disappear." He then goes on: "Should she change her mind a cable to me"—at such and such an address—"will find me, and I will immediately give instructions to renew payments." I am not expressing any opinion about the facts; but it is only fair to say that so far as I know he never carried out that threat, in the sense that he did not disappear, and, on the contrary, I gather that he did renew payments, although I am not sure about that.

The point is, that the attitude of mind described in this letter, and not described as having been come to at the moment but as being the carrying out of intentions already formed, is completely and absolutely contradictory of, or at least inconsistent with the case which he was presenting to Barnard J. I will discuss presently the implications and bearing of that documentary evidence upon the question with which we are engaged, but before doing so I feel bound to see, on the other hand, what material the learned judge had before him to induce or oblige him to inquire deeper into the case which the petitioner was putting forward, for one of Mr. Fairweather's arguments, and one which requires serious consideration, is that "error" may, amongst other things, include a failure on the part of the court to prosecute its statutory inquiries far enough. The point having been taken, must be dealt with, and dealt with frankly.

Barnard J. had before him the statement, the letter to the court, and two letters, one by the husband and one by the wife. I propose to look first at the statement to the court, without

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reading it all. After saying, as she did, that if this case was allowed to go through the court it would be on perjury, and that the evidence she was enclosing (namely, a bundle of correspondence, including the letters to which I have just referred) would explain better than she could, as she was no good at letter-writing, she proceeds: "I was thirty-five years old when deserted, and have devoted my life to the welfare of the children." I pause there to observe that the age given in the marriage certificate in 1905 shows that she is asserting that she was deserted in 1922, a fact which, I think, had not been brought out anywhere until I called attention to it in the course of the argument. After explaining that she was not able to instruct solicitors, and so forth, she says "Mr. Peek was the guilty one, and is using the High Court to get his freedom, so as to get back to Australia with this woman, who has ruined my life. She has used my name for twenty-five years." I need not read the rest of it except that she reiterates at the end that it was her husband who was the deserter—in those very words—"Mr. Peek was the deserter."

I am bound to say that although it is quite true that the husband had sworn that he had asked her to come to England, or at least that that was the understanding on which they parted I should not myself have been content, in dealing with this letter to the court (again repeating that I am not dealing with it from the point of view of evidence, but only of the indication it gives as to the line of inquiry to be followed), to dismiss it in these words addressed to counsel: "The only thing that really affects you, and that is at all material, is that she says 'Mr. Peek never at any time definitely said 'Come to 'England','" which is what the learned judge said about it. She said a great deal more than that which was very material, and I say that because I agree, as I have already said, that one of the points which we have to consider is whether the case now disclosed was so sufficiently indicated as to put the learned judge on his guard, and to make it an error on his part not to have discovered it.

From that I turn to the concrete evidence that was put before him, two letters, one by the wife and one by the husband. In August, 1926, the wife wrote a letter which begins: "I am just out of hospital after four months and . . . I may be a cripple for life, and it is *you* I have to thank, for nothing but worry has caused it; and then to get an insulting letter from that woman, and also to send back a photo of our children

" with a child of shame with it, that is more than I can stand.
 " I thought you were more of a man than that, to allow her to
 " do it. But never mind, there will come a time when you
 " both will have to pay. I do not want a divorce, but you are
 " making me get one, and I will only do it on two conditions "
 —and then she lays down the money terms on which she will
 be prepared to do it, which I need not go into. But there is a
 sentence at the end of the letter which shows once more her
 resentment about this woman, who is, of course, the woman
 mentioned in the discretion statement: " I will give this letter
 " time to get to you, and the reply by cable, before I do so.
 " Remember, never come to Brisbane with that woman, because
 " she will never leave here again, I can promise you that. Some-
 " body must pay, and why not her? " Then there is a postscript:
 " I am still willing to forgive and forget." It would, of course,
 be quite ridiculous to pretend that a letter like that does not
 require very serious consideration when the question of desertion
 or no desertion by the writer is in issue, and more particularly
 when read in conjunction with the husband's own letter, the
 correctness of the copy of which he admitted, written in
 January, 1945: " Dear Jennie, Some years ago you wrote me
 " that you would not divorce me so long as my mother was
 " alive. As she has now been dead for some years there is no
 " reason why, if you feel so disposed, you should not now do so.
 " You can, I understand, divorce me in Queensland on the
 " ground of desertion. We have now been separated for
 " twenty-five years, and you have known for a great portion
 " of that time that I have no intention of returning to live with
 " you." Both those letters are quite plainly susceptible of the
 interpretation that both are written in light of the known
 association with the woman mentioned in the discretion state-
 ment, but there is nothing that I can see in either of those two
 letters which necessarily dates any intention of his to keep away
 from his wife earlier than 1924, the year in which that connexion
 was formed. It is only from the letters which were not dis-
 closed, to which I have already referred, that that information
 appears.

As I think I have now dealt with all the material facts neces-
 sary to raise the issue, I must now deal with the submissions
 that have been made at the Bar on the dividing line between
 this court and the Court of Appeal, in particular as disclosed by
 the reported cases. There are three of them. The first is
Manners v. Manners (1), to which I need not refer in detail,

(1) [1936] P. 117.

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but which was a very clear case where, through no fault at all of the absent spouse, there had been miscarriage over the service and she was not, in fact, aware of the hearing. That is a plain case about which there cannot be any doubt. The two cases which do need careful consideration, and which have been used in opposite senses by counsel on either side, are *Winter v. Winter* (1) and *Petty v. Petty* (2). As I have already ventured to say in the case of *Petty v. Petty* (2), it is obvious that if a party comes to the court for a re-hearing of a case which has been decided against him or her, he or she does so because it is being asserted that the decision was wrong and that a decision in the opposite sense should be given ; but it is equally obvious that that fact alone cannot determine that there has been error on the part of the court or even that error is being alleged on the part of the court, for otherwise it would make complete nonsense of the rule, and, so far as one can judge, apart from some purely academic argument, there never could be any case which could come within the rule at all, if that consideration is to exclude the jurisdiction of this court. But, founding himself upon these two cases, Mr. Montgomerie argued that the real test was whether the case was defended or undefended. It does undoubtedly happen that *Winter v. Winter* (1) where the court, composed of the late Langton J. and Henn Collins J., decided to grant a re-hearing, was an undefended case. Equally, it happens that the court over which I presided in *Petty v. Petty* (2) was dealing with a case in which there had been a contest. In my opinion those are accidental, and not decisive, circumstances, for it seems to me that the argument in this case shows plainly that there may arise an undefended case in which the court has been in error, and, although it is not necessary to pursue the topic, I can well imagine that there may be defended cases in which it can be shown very well that the court was not in error. I can remember one such case, though it would not be covered by this rule because there was a jury, in which, precisely for that reason, there was no fault on the part of the court, but there was the discovery of some evidence which could not possibly have been discovered in any way before the trial. The Court of Appeal ordered a new trial, and the whole decision was reversed. But I need not pursue that topic further.

Winter v. Winter (1) raised two distinct points. First of all, unlike *Manners v. Manners* (3), there was deliberate abstention

(1) [1942] P. 151.

(3) [1936] P. 117.

(2) [1943] P. 102.

on the part of the applicant for a re-hearing, and the first question was whether, on a very well-known line of authorities, which bind ordinary litigants in appellate tribunals, the applicant could be heard to put forward the motion at all. About that, without repeating what I said in *Petty v. Petty* (1) or reading the judgment on this part of the case in *Winter v. Winter* (2), the court, if I may say so, was clearly right in coming to the view that the public interest in these matters transcended any technical rules about shutting out litigants who had deliberately stood by, and impelled the court to allow full investigation of the alleged new case. The other question raised this point which Mr. Fairweather has put forward, whether insufficient investigation by the court was of itself error. The point is dealt with in the following sentence of Henn Collins J.'s judgment (3): "As the wife swore that the husband had left her on a named date it could not be said that there was no evidence on which the learned judge who tried the case could find that he had deserted her, but to find that one party left the other without saying more about the circumstances of the parting is not a satisfactory way of disposing of a case." I have before me the transcript, and the question to which that comment alluded reads as follows: "I think he had some trouble with a motor-car in rather unpleasant circumstances, and he left you just after that?— (A.) Yes." That is the evidence and the whole of the evidence about the parting between those people. It is uncertain, and, so far as I can see, the uncertainty will never be resolved, whether the affirmative answer to this compendium of three or four questions related to the existence of trouble about the motor-car, or the fact that the trouble arose in unpleasant circumstances, or the fact that the husband had left the wife, or that if he had left her it was just after the trouble referred to; and it was plainly to that circumstance that Henn Collins J. directed the observation that I have just read.

I ventured in the course of the argument to put what I will assume is an entirely hypothetical case so as to test the matter. Supposing that there was, in the petition, the usual paragraph making the charge of desertion, with a certain amount of particulars, and supposing that the witness, having given the formal evidence about marriage and the rest of it, was asked this question and this question only, (having the petition put into

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(1) [1943] P. 102.

(3) [1943] P. 102, 105.

(2) [1942] P. 151.

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his or her hands): “(Q.) Is paragraph so-and-so true?—“(A.) Yes”; it would be possible on that to use precisely the words used by Henn Collins J. The point underlying the observation is this, that where the court has been satisfied by the evidence given, and—(I do not say that what follows applies literally to the court here, because there was some other evidence)—there being no other evidence before the court below and nothing whatever to qualify the evidence given in support of the charge, it is impossible to say that the court was in error merely because the judge had not conducted some more exhaustive inquiries. That is the real point on that part of the decision in *Winter v. Winter* (1).

It is said that *Petty v. Petty* (2) shows that this rule can never be applied except in an undefended case, where there is no information at all from the other spouse, or, putting it more accurately, Mr. Montgomerie’s submission goes as far as this, that it cannot arise at all when the other spouse is not there, even if there is some material relevant to his or her case. That argument was founded on a passage in my judgment in *Petty v. Petty* (3), where, after dealing with the point of public interest, and so forth, on the authority of *Harriman v. Harriman* (4), I continue as follows: “Those two cases, which, “so far as I know, are the only two cases in which a decision “of this court on this point has been reported, are, as I see it, “clearly on the right side of the line. Equally, however, it “seems to me impossible to assert that a case in which a judge, “having seen both spouses and their respective teams of “witnesses, has deliberately attached credibility to one side “and not to the other, and in which this court is asked to say “that the production of further evidence will induce some other “tribunal to say that the judge believed the wrong set of “witnesses, is on the same side of the line, so that it can be “asserted of such a case that ‘no error of the court at the “‘hearing is alleged’”; and Henn Collins J. said (5) the same thing, if I may be permitted to say so, very much better: “One thing, however, seems to me to be clear, and that is that, “if it is alleged that, on the materials before it, the court has “arrived at a wrong conclusion, that is an error of the court.” Note the words “on the materials before it.” “What exactly “is meant by the materials before the court,” Henn Collins J.

(1) [1942] P. 151.

(2) [1943] P. 102.

(3) Ibid. 104.

(4) [1909] P. 123.

(5) [1943] P. 102, 105.

continued, "is another matter. In the present case the material before the court was the evidence of witnesses on one side and the other. The judge accepted the credibility of one set of witnesses and rejected that of the other. It is now said that he believed the wrong set of witnesses, and that, if he had known some further facts which it is proposed to adduce, he would have discredited those whom he believed and believed those whom he discredited." It is said because these things were so, and it was emphasized that there were two sets of witnesses, that these observations can only apply to a defended case. I do not agree, and I would venture to recall another passage a little lower down in my own judgment, where, after calling attention to the fact that even in a case where the party was not there at all, because a false affidavit of service had been sworn, the judge would, so to speak, have believed the wrong witnesses, I went on (1): "Again, it may be mistaken identity, or it may be deliberate perjury," (that is about the swearing of the service of the petition) "but, although it is true that what is being asked is that it shall be held that the judge believed a witness wrongly, and although at the rehearing, the court is to be invited to believe witnesses who will swear exactly the opposite, still, in those circumstances, unless there was something which made the story self-condemnatory, the judge had no option but to believe the witness." Mr. Montgomerie says that is this case, and that it clearly comes within the rule. It was not a defended case, that is true. In that sense it is the same thing. But to assert of this case that any judge had no option but to come to the conclusion he did is, and must be, nonsense. I say that for this reason, that the very request for the exercise of the discretion of the court itself implies, whether it is a defended or an undefended case, that the judge has an option; otherwise, the discretion is meaningless. Of course he had an option. The real point, as I see it, is in those words with which the phrase "no option" is prefaced—"unless there was something which made the story self-condemnatory"—for if ever there was a case, undefended though it be, and not merely because the discretion was asked for but because there was, on the face of the case as it was presented to the judge, and avowedly and openly presented, the gravest possible doubt whether any court could hold that desertion had been proved, in which there was the plainest possible option to the judge to decide the case otherwise, it is this case.

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(1) [1943] P. 102, 104.

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It seems to me that the real point is this (bearing in mind that the question whether error is alleged is a question of substance and not a question of form, as I said earlier in this judgment) : is the allegation which is made against the decision an allegation that the court went wrong on the materials before it, or is it an allegation that the court went wrong because evidence on a vital matter was concealed from the court ? To my mind it cannot make the slightest difference, logically, whether that question or those questions fall to be decided in an undefended or a defended case. Just to bring the thing to a point, can there be any true distinction between cases, both of them undefended, in the first of which the petitioner says " I assert desertion but I ask for the discretion of the court," and a case in which the petitioner presents a case of desertion without confessing any adultery at all ? To enlarge on that, in the case in which he gives evidence in support of a charge of desertion while concealing any act of adultery on his part, you have a plain case where the court is quite helpless unless there is something on the face of it which is self-condemnatory. In the half-way case, where you have desertion proved, and a candid admission of the whole of the misconduct of which the petitioner is guilty, though it is quite impossible to say that the court has no option in the matter, nevertheless (again, subject to the decision as to how the discretion shall be exercised) there is no material before the court to divert it from the sole issue " Shall I or shall I not exercise my discretion ? " But, in the third case, where the petitioner not only gives evidence in support of the charge of desertion and discloses adultery, but discloses it in such a way as to conceal that part of his misconduct and all the other evidence which bears, for example, on such a vital factor as the inception of the separation, I ask myself what logical difference can there be between that kind of case and the plain undefended case where there is no disclosure of adultery at all ?

I reject the argument that this matter depends solely on the question whether the case is defended or undefended, and I come back to what I said just now, for, in my opinion, this case is an illustration, not of a case in which the court went wrong on the materials before it, but rather of a case in which it is alleged that the court went wrong (if it did—that remains to be determined) because evidence on a vital point was concealed from it.

I repeat and desire to emphasize that every case coming

within this rule must be considered on its own merits, and, in my opinion, when one analyses this case, the only thing which can be said to be error on the learned judge's part is a failure to appreciate, in the light of the documents which were not produced before him, the full possible implications of those which were produced before him. But, when one has said that, it still remains that it was the petitioner's concealment of those documents, of the existence of which we are now aware, which may induce some other tribunal to come to a different conclusion.

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In my opinion, using the metaphor of the line once again, this case is as near the line as it is possible for any case to be, at any rate, any case that I have hitherto heard of or am able to imagine at this moment. But having said that, I have come to the conclusion that it is just on the right side of the provisions of r. 36, and having arrived at that conclusion it means that we are the court who have to make the decision. There then arises the first essential question which I propounded : whether it is a case in which a re-hearing ought to be ordered. About that I have no doubt whatever. For these reasons, in my opinion, this application should succeed.

WALLINGTON J. I agree, and desire to add a very few words. It seems to me that one of the objects of r. 36 is to enable this court to secure, as far as possible, that there shall be a trial of the real issue between the parties, before permitting an appeal to the Court of Appeal. It matters not, as my Lord has said (and I entirely agree with what he has said) whether the question arises in a defended or an undefended case. The only difference between the two probably is that undefended cases of this kind will be more numerous than defended cases, but there is no difference in the application of the principle. The effect of the rule, as I understand it, is this : if a party to a motion comes to this court and, either expressly or by necessary implication, alleges that the judge who heard the case to which the motion relates made such a mistake or error as resulted in a wrong conclusion, then the matter is not one for this court but is one that must go to the Court of Appeal in the ordinary way. On the other hand, in a case where the applicant on the motion comes to this court and says, in effect, e.g., " There was no " error on the part of the court below in dealing with the " material then before it, or any other error of the court, but " I was not able to attend at the trial, I had much material in

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"my hands that I would have put before the court, and I desire
 "an opportunity of having the real case tried," and if, added
 to that, as in this case, it is plain that the petitioner has con-
 cealed from the judge who tried the case very material—indeed
 vital—facts affecting the real case between the parties, it seems
 to me to be plain that this court has both the jurisdiction and
 the duty to deal with it.

It cannot properly be said that the learned judge came to a
 wrong conclusion (or was otherwise in error) in dealing with the
 materials before him, but the real case between these parties
 has never been tried, and it could not be tried for two reasons :
 (1.) because it was impracticable, without any fault on her
 part, for the respondent to be present at the hearing of the suit
 and to place vital facts before the court, and (2.) because at the
 hearing of the suit the petitioner gave to the court information
 that, to his knowledge, must have omitted vital facts that would
 if disclosed, have enabled the learned judge to try the real case.

In those circumstances, as I have said, in my opinion there
 is no answer to this application, and I agree with the order that
 my Lord has indicated.

Application allowed.

Leave to appeal.

Solicitors : G. Parry Jones, the Law Society Services Divorce
 Department (Civil Section) ; C. R. Enever, Freeman & Co.

J. B. G.

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WARD v. WARD.

Oct. 15, 16.

Lord Merriman
 P. and
 Wallington J.

*Justices — Maintenance — Amount to be awarded — Discretion of
 justices unfettered by fixed standard—Summary Jurisdiction (Married
 Women) Act, 1895 (58 & 59 Vict., c. 39), ss. 5 (c), 7—Money Pay-
 ments (Justices Procedure) Act, 1935 (25 & 26 Geo. 5, c. 46), s. 9.*

It is the duty of justices in making an award for maintenance to
 discover what is a reasonable award to make in all the circumstances
 of a particular case, and not to apply automatically any formula
 based on a fixed proportion of the joint incomes of the parties.

The standard laid down in *Cobb v. Cobb* [1900] P. 294 is not
 applicable to modern conditions.

Jones v. Jones (1930) 142 L. T. 167 approved.

HUSBAND'S APPEAL to the Divisional Court from the rejection by a court of summary jurisdiction of an application to vary in his favour an order for maintenance payable to his wife. The facts and relevant figures are given in the judgment.

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H. J. Phillimore for the appellant husband.

H. D. Baskerville for the respondent wife.

LORD MERRIMAN P. This is an appeal by a husband from an order made by the justices for the petty sessional division of Bridport, against their rejection of an application made on July 22, 1947, to vary in the husband's favour an order for 35s. a week made on July 8, 1947. That order had been made on the basis that the husband was found guilty of desertion.

About the facts there is no doubt. The parties are childless and both are working. Taking the worst aspect of the case from the husband's point of view when all expenses have been deducted on both sides, he is left with a clear sum of 45s. and his wife is left with a clear sum of 30s. to spend or save as they respectively choose. If, on the other hand, what is stated to be a closer average of the husband's wages is taken, he is left with 33s. 6d. absolutely clear as against the wife's 30s. Another calculation has been put forward showing that taking the view most unfavourable to the wife and most favourable to the husband it is possible that the wife may have 6s. more to spend than the husband has. But let me emphasize that these figures are arrived at after every possible deduction has been made, with the possible exception of those relating to income tax.

It is said that the order is wholly unreasonable. It is admitted that every case must be decided on its own merits. Nevertheless not for the first nor, I fear, for the last time the well known authority of *Cobb v. Cobb* (1) has been cited to us, in spite of the fact that as long ago as 1930 Lord Merrivale in *Jones v. Jones* (2) said that "the conventional standard in the Divorce Court derived from the old jurisdiction of the ecclesiastical courts, by which a wife is not likely to get more than one-third of the joint income, is very difficult to apply to a man earning wages and a woman able to earn money." I do not know how many times I have ventured to say the same thing in even stronger terms. Nevertheless I am told that, possibly because nobody has thought it worth while to report utterances to that effect, *Cobb v. Cobb* (1) is still set up

(1) [1900] P. 294.

(2) (1930) 142 L. T. 167, 168.

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as the standard by which justices must act. I hope that some day text-books will take note of the fact that it has been repeatedly laid down since 1930 that it is quite absurd to apply automatically—and especially to working-class people—a standard which applied in the days when income tax was 1s. in the pound, rent-rolls were £10,000 a year and pin-money was 2,000*l.* or 3,000*l.* a year ; and that what justices have to discover is what is a reasonable award in the circumstances of the particular case.

They must, of course, have regard to the means of the parties. I say “Of course,” because the statute says that they must. The statute says that the justices may order “such weekly sum not exceeding 2*l.* as the court shall, having regard to the “means both of the husband and wife, consider reasonable” (1) but the statute does not say that that is the only thing they have to consider and it does not say that they are to exclude all other considerations than the means of the parties. I think it was in the case of *Dent v. Dent* (2) that I called attention to this, as well as to the other considerations which I have mentioned ; I gather that the case has not found its way into any report. So far as the so-called “one-third rule” is concerned with people in circumstances which can be likened to those in which it came into existence, I dealt with it in *Chichester v. Chichester* (3), but I am not suggesting that the case of *Chichester v. Chichester* (3) in its turn should be taken as a standard for the guidance of justices in these matters in the class of case which comes before them. The justices may think that this wife, having been deserted by her husband and obliged to go out to work instead of being maintained by him in a comfortable home, is entitled at the least to feel that her exertions are not made purely for the husband’s benefit ; and might feel obliged in her own interests to put money by against the day when, for example, the husband may re-marry or incur other commitments.

The only general observation which I make is that *Stephenson v. Stephenson* (4) and *Jones v. Jones* (5) to which I have already alluded, were both decided before the Money Payments (Justices Procedure) Act, 1935, was passed. The effect of that Act upon s. 7 of the Summary Jurisdiction (Married Women)

(1) Summary Jurisdiction
(Married Women) Act, 1895,
s. 5 (c).

(2) Unreported, April 15, 1942.

(3) [1936] P. 129.

(4) (1925) 41 T. L. R. 550.

(5) (1930) 142 L. T. 167.

Act, 1895, and upon s. 30 of the Criminal Justices Administration Act, 1914, is discussed and explained in *Underwood v. Underwood* (1) which was decided in this court. The point to which I am alluding is that in 1930, when *Jones v. Jones* (2) was decided, this court, and, indeed, the justices, had to consider these money awards with the knowledge that any decision they made was fettered so far as regards the possibility of revision or revocation by the well-known interpretation which has been put upon the words "upon fresh evidence"; whereas, since the passing of the Act of 1935 no such considerations apply. I am not suggesting that this should make justices careless as to the figure they award; but coupled as it is with the power under the same Act to wipe out arrears when any questions of revision and the like come before the justices it does at least ensure, or ought to ensure, that no permanent hardship should be done even if justices make a mistake. The point is that every word that was said by Lord Merrivale in *Jones v. Jones* (2) applies, I think, with even greater force under existing conditions. At the end of it all the question is: was there anything so unreasonable or indiscreet in the justices' award in this case as to entitle us to interfere with the decision of the justices? My answer to that is that I cannot see anything unreasonable in the amount the justices have awarded in the circumstances of this case. In my opinion this appeal must be dismissed.

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WALLINGTON J. I agree entirely. I desire to deal only with one matter raised in the admirable and able argument of Mr. Phillimore, and that is a suggestion that there is or, if not, that there ought to be, some fixed standard upon which justices must act in arriving at their decisions as to maintenance in these cases. For myself, I should very strongly deprecate any such standard. I do not believe that it exists and I believe that the attempt to impose one might lead to injustice in a number of cases. It seems to me that the words of the sub-section of the Act which governs these matters are such as to preclude any fixed standard. The duty of the justices is to award "such weekly sum not exceeding 2*l.* as the court shall, having regard both to the means of the husband and of the wife, consider reasonable" (3).

(1) [1946] P. 84.

(2) (1930) 142 L. T. 167.

(3) Summary Jurisdiction
(Married Women) Act, 1895,
s. 5 (c).

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In this case, as my Lord has said, and I entirely agree, there is no ground upon which anybody can suggest that the justices have done anything that differs from their duty. It is impossible for this court to consider shillings here or there or to imagine that this court can apply to the case any considerations different from those which the justices in fact applied to it when they were considering what they should do. For these reasons I am clearly of the opinion that there is no ground for interfering with this decision and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Lovell, Son & Pitfield, for Roper & Roper, Bridport; Hatchett Jones & Co., for Austen Whetham, Bridport.*

J. B. G.

ed. IN THE GOODS OF DOWDS.
[1948] P. 256

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Dec. 3.

Willmer J.

IN THE GOODS OF FRANTISKA SCHULHOF,
PRESUMED DECEASED.

IN THE GOODS OF MARIE GERTRUDE WOLF,
PRESUMED DECEASED.

Probate — Presumption of death — Evidence required — Foreign declaration of death—Existence or otherwise of foreign vesting order.

Where a declaration of death by a competent court of the domicile of a presumed deceased has been followed by an order of the courts of that country vesting the estate of the presumed deceased in the persons entitled thereto, his or her death will be presumed without further evidence being adduced; but where there is only a declaration of death by the foreign court and no vesting order, the Court of Probate will require further evidence as to the circumstances from which death might be presumed.

In the Goods of Spenceley [1892] P. 255 followed.

MOTIONS for presumption of death.

In the case of the estate of Frantiska Schulhof, a domiciled Czecho-Slovakian, the court had before it declarations of a competent Czecho-Slovak court—the district court of Hlinsko—which stated that the wife and mother-in-law of the applicant were to be presumed dead, they having become missing when in narrow peril of death in 1944. The probable place of death was given in both cases as Osviecem, otherwise Auschwitz.

The court had also before it orders made under the seal of the district court of Hlinsko vesting the estates of the presumed deceased in the applicant. In the case of the goods of Marie Gertrude Wolf, whose domicile was also Czecho-Slovakian, the court had a similar declaration from the district court of Brno that death was presumed to have taken place at the same notorious concentration camp ; but no steps had been taken to apply to the courts in Czecho-Slovakia for a vesting order as it was not thought that the presumed deceased possessed any property in that country.

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Clifford Mortimer for the applicants.

WILLMER J. It seems to me that the situation which has arisen in the case of Schulhof is identical with that in *In the Goods of Spenceley* (1) to which I have been referred. There a grant had been made in one of the United States of America based on the presumed death of the deceased ; and the learned President felt himself bound to follow the American grant as it stood without requiring any evidence of the death of the presumed deceased. On the evidence which I have heard on the Czecho-Slovak law, and on the orders of the Czecho-Slovak court which I have seen, it appears to me that in the case of Schulhof the applicant is entitled to the order prayed for.

In the case of Wolf, which, because of its similarity and dissimilarity, I had called on at the same time, the situation is different to this extent. There is a declaration of death in accordance with the Czecho-Slovak law, but there is nothing in existence by way of order of the court which has anything to do with succession or grant of administration or vesting of property. There is nothing but the declaration of death, a declaration arrived at, it is true, in accordance with the procedure laid down by the Czecho-Slovak code, but which remains a declaration of death and no more. It seems to me that that case is far from being brought within the principle laid down in *In the Goods of Spenceley* (1). The manner in which death may be proved is a matter of pure procedure, and because a certain procedure is permissible in Czecho-Slovakia which enables a declaration of death to be made, it does not seem to me to follow in the least that the court in this country is bound to accept the declaration of the Czecho-Slovak court as conclusive. It appears to me that before this

(1) [1892] P. 255.

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court can be asked to presume the death in the case of Wolf, and before it can be asked to make a grant, there must be evidence satisfactory to this court to show that the presumed deceased is in fact probably dead.

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[*Clifford Mortimer* then tendered further evidence in the case of Wolf, and having read the affidavits the learned judge made the order as prayed in the motion.]

Solicitors : *Pritchard, Englefield & Co.*

J. B. G.

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HASTING v. HASTING.

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Oct. 13, 14.

Tucker,
Bucknill and
Cohen L.JJ.

Divorce—Maintenance—Leave to apply more than one month after decree—Jurisdiction of registrar—Delay matter for discretion—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190—Matrimonial Causes Rules, 1944 (St. R. & O. 1944, No. 389/L. 16), r. 44, sub-r. 1.

A judge, by granting leave under r. 44 of the Matrimonial Causes Rules, 1944, to apply for maintenance more than a month after final decree, thereby decides that the application is, in the circumstances, an application made "on" the decree within the meaning of s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, and so gives the registrar jurisdiction to entertain and report on it. The fact of the delay, however, still remains a matter to be taken into account, in considering the application on its merits, by the registrar, or, on appeal, the judge, each of whom remains free to make an order for maintenance or not as, in his discretion, he thinks proper.

Fisher v. Fisher [1942] P. 101, applied.

Decision of Jones J. affirmed.

APPEAL from Jones J.

The appellant husband and the respondent wife were married in 1911. They separated in 1927, and the husband then paid the wife 25*l.* a month and, later, 3*l.* a month for a child of the marriage and his school fees. In 1935 the wife filed a petition for divorce in which she asked the court to exercise its discretion in her favour. The petition was undefended. In November, 1936, a decree nisi was made and the court exercised its discretion in the wife's favour. In 1937 the husband paid her 3*l.* a week, and thereafter, until March, 1946, he continuously made contribution to her maintenance. The amount was

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

raised in 1939 to 4*l.* a week, in September, 1939, reduced to 3*l.*, and at a later stage to 2*l.* a week and 8*l.* a month. In March, 1946, it ceased altogether. There was evidence that the variations in the amounts had some relation to the earnings and the position for the time being of the wife. In the autumn of 1946, the wife applied, under r. 44, sub-r. 1, of the Matrimonial Causes Rules, 1944, for leave to file an application for maintenance, under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1). Wallington J. granted leave to apply, and the application came before the registrar, who stated in his report that the lapse of time between the decree and the application deprived him of jurisdiction to entertain the latter. He said that he would have awarded 30*s.* a week maintenance if he had had jurisdiction. Jones J., when the report came before him, made an order for maintenance at 30*s.* a week. The husband now appealed.

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Beyfus K.C. and *Moylan* for the husband. All that the judge can decide, to whom application is made under r. 44, sub-r. 1, of the Matrimonial Causes Rules, 1944, is that the

(1) By s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925: "(1) The court "may, if it thinks fit, on any "decree for divorce or nullity of "marriage, order that the husband "shall, to the satisfaction of the "court, secure to the wife such "gross sum of money or annual "sum of money for any term, not "exceeding her life, as having "regard to her fortune, if any, to "the ability of her husband and to "the conduct of the parties, the "court may deem to be reasonable, and the court may for that "purpose order that it shall be "referred to one of the conveying counsel of the court to "settle and approve a proper deed "or instrument, to be executed by "all the necessary parties, and "may, if it thinks fit, suspend the "pronouncing of the decree until "the deed or instrument has been "duly executed. (2) In any such "case as aforesaid the court may,

"if it thinks fit, by order, either "in addition to or instead of an "order under sub-s. 1 of this "section, direct the husband to "pay to the wife during the joint "lives of the husband and wife "such monthly or weekly sum for "her maintenance and support as "the court may think reasonable"

By r. 44, sub-r. 1, of the Matrimonial Causes Rules, 1944: "An "application for maintenance, a "secured provision, variation of "marriage settlements, or settlement of a wife's property, in the "case of proceedings for divorce, "may be made by the petitioner "at any time after the time for "entering an appearance to the "petition has expired and by a "respondent spouse at any time "after entering an appearance to "the petition, but no application "shall be made later than one "month after final decree except "by leave of a judge."

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applicant for maintenance (in this case the wife) has a prima facie case for a grant of maintenance. It is then for the judge, before whom the application for maintenance comes after the registrar has made his report, to decide whether or not he has jurisdiction to entertain the application. Jones J., has not applied his mind to that point, for he says that Wallington J. has already disposed of it. The registrar, when he came to make his report, was left free, having regard to the leave to apply for maintenance given by Wallington J., to consider whether the lapse of time since the decree rendered it impossible to say that the application for maintenance was made "on" the decree within the meaning of s. 190, sub-r. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, and so deprived him of jurisdiction to entertain the application. He decided that he had no jurisdiction, and Jones J., should not have disturbed that decision.

F. S. Laskey (Blanco White K.C., with him) for the wife. While it might well be argued that the registrar was wrong on the facts in deciding that he had no jurisdiction, it is unnecessary to do so, for Wallington J. had, by granting leave under r. 44, sub-r. 1, already decided the question of jurisdiction. He had given the wife permission to present the facts to the court under s. 190 of the Act of 1925. [*Scott v. Scott* (1) and *Legge v. Legge* (2) referred to.] In the present case there are, as there were in *Fisher v. Fisher* (3), special facts which were put before Wallington J. Having considered them, he decided that the wife should be permitted to make her application. When it was suggested to him that he was giving the wife the right to maintenance, Wallington J. replied that he was doing no such thing, and that the matter would go before the registrar for him to consider on all the facts. The matter was three times before the registrar, and on that full consideration of it he made his report, which was that the application was out of time. He was thereby deciding in a contrary sense to Wallington J. He said that the application was not being made within a reasonable time after the decree, and he rejected it on that ground alone. But for the question of delay, he said, he would have been minded to make an order for 30s. a week maintenance. The registrar took a wrong view of the matter, for he had a complete discretion, and, in making his report, was under a duty to take all the relevant facts into consideration

(1) [1921] P. 107.

(3) [1942] P. 101.

(2) [1929] W.N. 9; 45 T.L.R. 157.

including the question of time, which, though not operating, in view of Wallington J.'s order, to deprive the registrar of jurisdiction, yet remained a matter for him to take into account in deciding whether or not to make an order for maintenance and, if so, how much to award. Jones J. was right in reversing the registrar's decision on the ground that he had taken the wrong view of the question of jurisdiction. There is nothing to show that Jones J. did not exercise his discretion properly and that his order in favour of the wife was not made in pursuance of that exercise.

Beyfus K.C. in reply. The applicant for maintenance has, after a lapse of time, two hurdles to surmount, the procedural hurdle under r. 44 and the statutory hurdle under s. 190 of the Act of 1925. By surmounting the first she does not also jump the second. The decision on the procedural matter by Wallington J. could not bind the registrar on the question of jurisdiction arising under the statute.

TUCKER L.J., stated the facts, read s. 190, sub-ss. 1 and 2, of the Act of 1925 and r. 44, sub-r. 1, of the Rules of 1944, and continued: It is to be observed that the jurisdiction of the court under s. 190, sub-s. 1, is to make an order "on "any decree." Questions have arisen from time to time as to what period of time must, or may, elapse so as to render it impossible for the court to say that it is making an order "on " the decree. As a great deal more than one month had elapsed from the making of the decree it was necessary to obtain the leave of the judge before this application by the wife for maintenance could be made, and, accordingly, application was made to Wallington J. Under the rules, these applications are not *ex parte*, but are considered in the presence of both parties. Wallington J., having considered the affidavits filed by both sides, gave leave to make the application. The result of that, in my view, was that he decided that, in the circumstances of this particular case, the application could be considered as being made on the making of the decree, and that thereafter it would be for the judge in the Divorce Division who had to consider the application on its merits, after considering the report made by the registrar, to decide whether or not, in the circumstances of the case, an order for maintenance should or should not be made.

The position of the court in connexion with these matters was considered recently by the Court of Appeal in *Fisher v.*

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Fisher (1). The wife there obtained a decree nisi of divorce in March, 1934, which was made absolute in the following October. No application was made for permanent maintenance, but an order for alimony pendente lite had been made, and the husband continued to make payments at the same rate until May, 1940. He then fell into arrear, and no payment was made after May, 1941. Protracted negotiations for the settlement of property on the wife took place, while the husband was making the payments to her, but they were never concluded. The wife applied seven and a half years after the decree absolute for leave to file a petition for maintenance. It was held, to quote the Law Reports, that, in the circumstances the wife ought to be given leave to apply to the court for an order for permanent maintenance, Goddard L.J. dubitante. In discussing the position of the court under s. 190 of the Act of 1925 and r. 44 of the Rules of 1944, Lord Greene M.R., said (2): "The question whether or not, in the circumstances of "this case, the court would have under s. 190, sub-s. 1, jurisdiction to order permanent maintenance is the principal "matter which has been discussed before us. Before I examine "that problem it must be borne in mind that, if the court is "minded to allow this appeal, all that it will be doing will be "giving permission to the making of an application for "permanent maintenance. It will not be dealing in any way "with the merits of such an application, nor will it be tying "the hands of the judge before whom the application comes. "He will consider whether it is right and proper that any order "should be made, and, if so, what that order should be. The "husband, therefore, will have every opportunity of putting his "case on the merits before the court." Lord Greene M.R., then went on to consider the circumstances of that case and came to the conclusion that the application was made within a reasonable time so as to enable the court to consider it as being made on the making of the decree. On the facts of that case, Goddard L.J., while not dissenting, expressed considerable doubt whether leave should have been granted to make the application. Henn Collins J., had refused leave, and the Court of Appeal, having further material before it, considered that leave should be given. Goddard L.J., after stating that he was not dissenting, added these words (3): "The fact that we "are giving leave to make this application still leaves the judge

(1) [1942] P. 101.

(3) Ibid. 107.

(2) Ibid. 103.

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"before whom it comes an entirely free hand as to what order, if any, he makes on it. I will add no more, because I do not want to say anything which would indicate to him a view on a matter which is eminently one for his discretion."

In my view, the position after Wallington J., had made the order giving leave to make this application was exactly the same as in *Fisher v. Fisher* (1) after the judgment of the Court of Appeal, although, of course, in that case no doubt the court had considered the matter in much greater detail and had expressed their views on the circumstances which caused the delay. The position was clarified by Wallington J.'s decision to this extent: he decided that there was jurisdiction under s. 190 to make this application, and thereafter it was for the judge of the Divorce Division who had to entertain the application on the registrar's report to decide whether or not, in all the circumstances of the case, he would exercise his discretion in favour of the wife. One of the matters which it would be open to him and, in fact, his duty to take into consideration would be the delay, because, notwithstanding that it had been decided that the delay was not such as to preclude the wife from making the application, none the less in certain cases the delay might have prejudiced the husband, financially or otherwise, in such a way as either to make it undesirable to exercise the discretion in the wife's favour at all or to affect the quantum of the maintenance.

In my view, that is the proper approach to cases of this kind, and having regard to the decision in *Fisher v. Fisher* (1) I do not think that the registrar did approach this matter quite in the right way. He, having had the parties before him, heard their evidence, considered the affidavits, and evidently went into the matter very carefully. On this question of delay he said, at the beginning of his report: "The application for maintenance was not filed until ten years later"—that is ten years after the decree—"on November 21, 1946, and the wife relies upon the decision in *Fisher v. Fisher* (1) in asking the court to regard this application as being 'within a reasonable time after the decree'." Then, having discussed the facts and the financial position of the husband, he says: "This is an unhappy case in which I should have been glad if I had a completely unfettered discretion to ignore the ten years delay and to make a small order of 30s. a week for maintenance. Unfortunately, however, it is quite clearly

(1) [1942] P. 101, 103.

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“laid down by the Court of Appeal that there is no such general discretion, but that the court can make an order only if it is able to say that in all the circumstances of the case the application is being made within a reasonable time after the decree absolute and can therefore be deemed to be made ‘on the decree absolute’ as the statute provides. Although the length of the delay is by no means the only consideration it has to be observed that so long a time as ten years after decree absolute has never yet been regarded as a reasonable time.” Then he compares *Scott v. Scott* (1) and *Fisher v. Fisher* (2) and continues: “In the present case the husband varied the amounts on several occasions clearly indicating that they were voluntary payments and no amount had ever been fixed by order. . . . The factors that finally decided the Lords Justices in *Fisher v. Fisher* (2) are not present in this case Moreover, the Court of Appeal was careful to emphasize that even in the case of *Fisher* (2) it was deciding only that it should be *considered* by the proper tribunal whether any order should be made and that the case should not be stopped in limine as automatically barred by the effluxion of time I submit that this application cannot be held to be made within a reasonable time after the decree absolute and that the maintenance application should be dismissed.”

The registrar is clearly there deciding that he has no jurisdiction to entertain the matter because as a matter of law the application cannot be considered as having been made on the making of the decree. He decides that as a matter of law, after considering *Fisher v. Fisher* (2) and *Scott v. Scott* (1). I think that he was wrong in taking that view. That matter had, in my opinion, been decided by Wallington J. It was for the registrar to consider, not whether as a matter of law a reasonable time had elapsed, but whether the delay was such that, in the exercise of his discretion, he ought either to refuse an order or to come to the conclusion that the delay might affect the quantum that he would otherwise have seen proper to order.

Jones J., on appeal, held that the registrar had taken an erroneous view of the matter. He therefore varied the report but adopted his suggestion that 30s. a week would be the proper figure on the merits if there were jurisdiction to make the order and if, in the exercise of its discretion, the court thought that an order ought to be made notwithstanding the delay.

(1) [1921] P. 107.

(2) [1942] P. 101, 103.

We have been supplied with a rough note taken by one of the counsel who appeared before Jones J. on the hearing of the application, which at one time led me to think that the judge had approached the matter from a wrong angle. The note is very shortly as follows: "I feel Wallington J. had to consider whether the application was within a reasonable time. Bound by his order. Registrar no jurisdiction after that to re-decide the point and it is not open to me." At one time I was inclined to think that that rough note indicated that Jones J. had not applied his mind to the question whether or not the delay was a matter which should be taken into consideration before he exercised his discretion, for, after all, it was his discretion which was being exercised, and the registrar had merely prepared material to enable him to exercise that discretion. On further consideration, however, I think it fairly clear that all that Jones J. was doing was to reject the reasoning of the registrar on much the same grounds as those on which I have rejected it. There is nothing to indicate to me that Jones J. did not properly apply his mind to the considerations which should present themselves to the judge who is considering these matters. He has rejected the registrar's view of absence of jurisdiction, he has had all the affidavits before him, including those before Wallington J., and he has decided on the facts to make an order of 30s. a week. Junior counsel for the husband stated that he submitted to Jones J. that the registrar had come to the proper decision on that matter and that, in any event, the matter of delay was one which should have been taken into consideration by the judge so as to cause him to reject the application altogether. Apart from that, however, counsel said, he would not be disposed to quarrel with the figure of 30s. a week which had been provisionally suggested by the registrar.

It has not been established to my satisfaction that Jones J. in any way failed to exercise his discretion in a proper and judicial way, and, therefore, this appeal fails.

BUCKNILL L.J. I agree.

COHEN L.J. I agree. At the end of his argument Mr. Beyfus said that the wife had to surmount two hurdles, first, the procedural hurdle under r. 44, and secondly the statutory hurdle under s. 190. He said that Wallington J. had no doubt successfully got the wife over the first hurdle, but that

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it was still open to Jones J., on the hearing of the wife's application, to reject it on the ground that he had no jurisdiction to make an order. I agree with my brethren in rejecting this argument, and the only point which I wish to make is that, even if it had been well-founded, I am by no means satisfied on the facts that the result would have been any different. Indeed, I think, bearing in mind the passage in the judgment of Lord Greene M.R., in *Fisher v. Fisher* (1) which was cited by Tucker L.J., that it might well be that, had it been open to us to treat the matter as not decided by Wallington J. we might still have come to the same conclusion. Lord Greene M.R. also said (2): "It may, of course, be said that the wife should have "broken off negotiations and taken the step of applying "to the court at a much earlier stage. It is true that she might "have done that, but I always feel that the court in domestic "matters should be slow to take any course which would "discourage the parties from negotiating and discussing in a "friendly way, instead of rushing into litigation with one "another. Even if they have been divorced, it is not desirable "that they should always be having recourse to the courts if "there is a reasonable chance of their being able to compose "matters outside. That applies more particularly if there is, "as there was in the present case, an infant child of the "marriage." In *Fisher v. Fisher* (1) the Court of Appeal came to the conclusion that there were facts which justified delay and left them free to find that the application was made within a reasonable time. Though the cases are not identical, I think that I might well have come to the same conclusion on the facts of this case as did the Court of Appeal in *Fisher v. Fisher* (1).

For this reason, in addition to those given by my Lord, I agree that this appeal fails.

Appeal dismissed.

Solicitors for the husband : *Kenneth Brown, Baker, Baker.*
Solicitors for the wife : *Ramsden & Co.*

(1) [1942] P. 101.

(2) Ibid. 105.

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Husband and wife—Nullity—Wife's pregnancy at time of marriage—Marital intercourse after husband's "discovery" of facts—Relevance of husband's belief—Matrimonial Causes Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 57), s. 7, sub-s. 1 (iii).

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and Filcher J.

It is not a condition precedent to the operation of proviso (iii.) to s. 7, sub-s. 1, of the Matrimonial Causes Act, 1937 (1), that a husband shall have come to believe that his wife was pregnant by another man at the date of the marriage ceremony, although a husband's belief or otherwise is a matter to be taken into consideration by the court in deciding whether at any given time he had made "discovery," within the meaning of the proviso, of his grounds for complaint. It is sufficient to bring the proviso into operation and, accordingly, to debar him from relief under the sub-section, that he has had marital intercourse with his wife at a time when he has acquired knowledge of facts which would convince any reasonable man that his wife was pregnant by another man at the date of the marriage ceremony.

APPEAL from Judge Forbes, sitting as a Divorce Commissioner.

The facts were stated by BUCKNILL L.J., substantially in the following terms:—The appellant husband and the respondent wife were married on July 7, 1945, when they were both twenty-six years old. From September 13, 1944, to July 7, 1945, before the marriage, the husband had been serving in His Majesty's Forces in Europe. On July 16, the marriage having been consummated, the husband returned to Germany. In September, 1945, he received a letter from his wife telling him of her pregnancy, of which he had had no previous information. He was satisfied that he was the father, and expressed pleasure at

(1) S. 7, sub-s. 1, of the Matrimonial Causes Act, 1937, provides: "In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground . . . (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner: Provided that, in the cases specified in paras. (b), (c) and (d) of this sub-section, the court shall not grant a decree " unless it is satisfied—(i.) that the petitioner was at the time of the marriage ignorant of the facts alleged; (ii.) that proceedings were instituted within a year from the date of the marriage; and (iii.) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree."

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

C. A. the prospect. On October 21, 1945, he came home and spent
1947 some time with his wife. On January 13, 1946, he was demobilized, and on February 3 he went to live with his wife. He
SMITH learned then that the booking of the nursing home for the birth
v. of the child had been fixed for March 24, 1946. On February 7
SMITH. his wife visited the clinic and then told her husband that all was going well. That night she started her labour, and at 2.30 a.m. on the eighth the child was born, that is to say, exactly seven months after the marriage.

On February 15 the husband was shown by his father an anonymous letter written to the husband's mother in which there was a statement that the child was a full-time child. The husband thereupon went to see the midwife who had delivered the child. The husband said in evidence that he went to find out whether the child was actually his, whether it was a full-time child, and that the midwife, in answer to that question, said that it was a full-time child and that she would have had to call in the doctor had it been otherwise. The husband said that he still believed that the child was his. He asked its weight at birth and was told eight-and-a-half pounds. He then went to consult the doctor, who had not been present at the birth but who had been in charge of the pre-natal clinic. The doctor's evidence was that the husband was obviously much worried, that he stated the weight of the baby, eight-and-a-half pounds, and asked if it was possible for it to be a premature baby. The reply of the doctor was that it was rather unusual. He advised the husband not to speak to the wife about the matter until she had recovered from her confinement, and then to consult a solicitor. That interview with the doctor took place on February 21. The husband had already also consulted his parents who had assured him that if the child was a full-time child it must have been conceived before the marriage.

In the teeth of that evidence, instead of asking his wife whether the child was his, which question he could have put quite well if he had waited for a few days, instead of restraining himself until that all-important question had been put to his wife, the husband on February 25, that is to say, a little more than a fortnight after the child was born, had marital intercourse with his wife. It was not until March 7 that he asked the wife point-blank whether the baby was his. She then confessed that it was not, and told him that she had been seduced by a man on V. E. day when she was drunk. On receipt of that information, on March 9, he consulted his lawyer and began these proceedings.

On those facts the commissioner found as follows: "I do not find that he" [the husband] "was positively convinced of it, because he was struggling against the belief. He was, as a young man in love with his wife may very well be, in a state of mind in which he would not believe it if he could possibly help it. Nevertheless in my view he had before him facts and opinions which made it abundantly clear to him that in all probability this was not his child. I say made it abundantly clear to him, in this sense: there was proof, if he would give it its proper weight, even if he was, may be, as a result of affection for the mother, may be, as Mr. Marshall suggests, in a frame of mind which is in some respects admirable, in a frame of mind which was so loyal to his wife that he would not accept the truth if it was put before him and he could possibly avoid it." The commissioner came to the conclusion that the case was caught by the proviso to s. 7, sub-s. 1, and that, although the wife was pregnant by another man at the date of the marriage, the husband had had marital intercourse with her after he had discovered the existence of the ground on which he relied for his decree. He accordingly dismissed the petition. The husband appealed.

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A. P. Marshall K.C. for the husband. The state of this husband's mind which the commissioner has found to have existed was not such as to deprive him of his remedy by virtue of proviso (iii.) What is required is a conviction in the husband's mind that his wife has been unfaithful to him and that he is in a position to divorce her. There must be something more than just communication to his mind of facts which normal people might expect to give rise to a conviction in him. The commissioner actually finds that the husband was fighting against what a reasonable man would have accepted to be the truth. He does not find that any reasonable man would have believed, in the circumstances, that his wife was pregnant. It is sufficient for the husband's case that the commissioner has found that he was not positively convinced of his wife's guilt. The question of degree of reasonableness of belief is subordinate to that of the actual belief in the husband's mind. It cannot be said, on these findings, to have been established that this husband has discovered "the existence of the grounds for a decree." This is a question of first impression: there is no authority bearing on it. The only relevant question is whether the husband believed, and accepted, that his wife's child

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was that of another man at the time when he first had marital intercourse with her after the birth of the child. The commissioner has clearly found in the negative on that question. That being so, there cannot have been any "discovery" by him within the meaning of the proviso. [*Sneyd v. Sneyd* (1) referred to.]

Laskey for the wife. Everything turns on the communication of information to the husband. It is not proper for the court to consider whether the husband accepted the information except in so far as his acceptance of it confirms that he actually received it, for example, because he acted in a certain way subsequently. What is required in order to bring the proviso into operation is the communication to the husband of such facts as would carry the conviction to the mind of a reasonable man that his wife's child had been conceived to another man before the marriage.

[TUCKER L.J. That must involve some weighing of the material communicated. A mere anonymous letter would not be enough.]

The court must consider the nature of the information communicated in order to decide whether it would carry conviction to the mind of a reasonable man, such a conviction that the husband should at least be put on inquiry. It must consider the facts communicated and the degree of the husband's knowledge of the facts of life. It may be a significant factor whether or not he has the necessary medical knowledge. For example, a husband might be able to show that he was so ignorant that the facts communicated meant nothing to him.

[TUCKER L.J. Would that be relevant if the test is what a reasonable man would think?]

If he could establish affirmatively that he was without certain knowledge and that without that knowledge the facts communicated meant nothing to him, it would be arguable that he had not sufficient knowledge to make the "discovery" to which the proviso refers. The evidence shows that this husband had the requisite knowledge. The facts communicated to him should, therefore, if he was open to conviction at all, have convinced him that his wife had been pregnant by another man. He had intercourse with her after hearing from the doctor that a child weighing eight-and-a-half pounds at birth, as this child did, was unlikely to be premature. The evidence was that the husband knew the meaning of the expression

"full-time child." In those circumstances the commissioner, it is submitted, was bound to find that the husband had enough knowledge to constitute a "discovery" of grounds for a decree within the meaning of the proviso.

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Marshall K.C. in reply. The relationship of husband and wife is not like an ordinary relationship between persons. The test of reasonableness applicable is the test of the reasonable husband, not of the ordinary reasonable person. The lack of belief by her husband in this wife's infidelity is not surprising. The communications made to the husband must first ripen into conviction in his mind. The commissioner has found that positive conviction never formed itself in the husband's mind. Therefore, it is submitted, he cannot be held to have made the "discovery" to which the proviso refers.

BUCKNILL L.J. [delivering the first judgment at the request of TUCKER L.J., stated the facts, read s. 7, sub-s. 1, of the Act of 1937, and continued :] On behalf of the husband it was argued that, whereas there was a finding by the commissioner that the husband was not, when he had intercourse with her on February 25, positively convinced that his wife had been pregnant by another man at the date of the marriage, in this particular case it was essential that the husband should believe that his wife was pregnant in that way before the proviso came into operation. While of opinion that that belief must play its part in considering whether the husband had discovered the existence of the grounds for a decree, I do not myself think that it is a condition precedent to the operation of the proviso, for it might very well be that the husband refused to believe in the teeth of overwhelming evidence. "None so blind as those who won't see," is an old saying, and if belief in those circumstances were essential for the proviso to come into operation a very grave injustice would be done to the wife, whose position, also, must be taken into account. It may be that she was to blame in the first instance, but she is entitled, I think, to take up the position that if the husband knew or ought to have known that she was pregnant at the time of the marriage, and, notwithstanding that, chose to have connexion with her, she is entitled to relief under the proviso and to say that the husband, having had connexion with her in those circumstances, is debarred from obtaining a decree against her.

In my view, the commissioner was right in his finding that the facts laid before the husband would have made abundantly

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clear to any reasonable man that the child was not his. I think that that is the proper test when interpreting this proviso. It is not possible to read the mind of a particular man. It is only possible to consider what inference a reasonable man would draw from the facts laid before him. In my view, the facts laid before this husband were such that any reasonable person would have drawn the conclusion that his wife was pregnant at the date of the marriage by some person other than himself. Having those facts in his mind, he chose to have intercourse with his wife without asking her whether his suspicions were correct. By doing that, he has, I think, put himself outside the relief given by s. 7. The commissioner was right in holding that the petition should be dismissed.

TUCKER L.J. I agree. I have felt some doubt in the course of the arguments what our decision should be in this matter, which is one of considerable importance.

In construing this section we have to bear in mind that this particular proviso applies not only to petitions for divorce on the ground of the wife's pregnancy by some other person at the time of the marriage, but also to petitions founded on allegations that the other party to the marriage was at the time of the marriage of unsound mind or a mental defective within the meaning of the Mental Deficiency Acts or subject to recurrent fits of insanity or epilepsy, or was at the time of the marriage suffering from venereal disease in a communicable form. The court must take those provisions into consideration when considering whether or not the belief of the petitioner in the grounds discovered is essential to his or her obtaining this relief from the court in cases where marital intercourse has taken place after the date of the discovery. I have come to the conclusion that belief is not essential in these cases, and that it would not be right to read such a requirement into the words of this proviso. In this particular case the husband, at the time when he had connexion with his wife on February 24, had discovered the following matters: that the child had been born on February 8, 1946; that it then weighed eight-and-a-half pounds; and, from the nurse who was present at its birth, that it was a full-time child, which means that it was a child born nine months from the time of intercourse. In my opinion, if those facts were brought before a court of law with no contrary evidence or explanation and with no denial by the wife, they would be bound to lead the court to the conclusion that the

wife was, at the time of the marriage, pregnant by some man other than the husband. Can it be said, when the husband has discovered those facts, and, if I am right in saying that those are facts on which any court would act, that he has not discovered the existence of grounds for a decree because he was unwilling or unable to draw the obvious deduction? I think that his belief in those circumstances is quite immaterial. In testing the nature of his discovery by the way in which a court would react to the truth of the facts discovered, I hope I am merely expressing the reactions of the reasonable man.

This appeal fails.

PILCHER J. I agree.

Appeal dismissed.

Solicitors for the husband: *Browne & Wells, Northampton.*

Solicitors for the wife: *Porrett, Fawcett & Renwick, Sheffield.*

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Applied. WAY v. WAY
[1950] P. 71

APT v. APT.

Husband and wife—Nullity—Wife domiciled in England—Celebration of marriage by proxy abroad—Validity.

The celebration of marriage by proxy is a matter of the form of the ceremony and one for the *lex loci celebrationis*. There is nothing abhorrent to Christian ideas in that form, which does not touch the essential validity of the marriage. In the absence of legislation to the contrary, there is no doctrine of public policy by which such a ceremony, valid where it was performed, may be held to be ineffective in this country to constitute a valid marriage.

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Oct. 20, 21,
22, 23;
Nov. 10.
Tucker,
Bucknill and
Cohen L.JJ.

Decision of Lord Merriman P. [1947] P. 127, affirmed.

APPEAL from Lord Merriman P.

On January 15, 1941, while the appellant was in this country, she being not only resident but domiciled here, a ceremony of marriage was celebrated at Buenos Aires between her and the respondent. She was represented by a person whom, by a power of attorney executed on November 8, 1940, in London, she had named as her representative to contract the marriage. The husband, as found by Lord Merriman P., was resident and

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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domiciled in the Argentine at all material times. The wife gave evidence that she had at no material time any intention of revoking the power of attorney, that she was informed in due course of the performance of the ceremony, and that she was not merely ready and willing, but eager, to join her husband in Buenos Aires, but was prevented from doing so during the war. She further deposed that when, after the war, she renewed her efforts to join the husband, he took no steps to assist her and ignored her alternative suggestion of a meeting in the United States of America, and that it was this conduct on his part which decided her to present the petition in this matter.

A Dr. Palacios was called to give evidence as to the relevant Argentine law, and the result of his evidence, so far as material, may be summarized as follows : (1.) Argentine law recognizes proxy marriages. Accordingly by that law the ceremony was valid and effectual, and the marriage would be recognized as a valid marriage by the law of the intended matrimonial domicile. (2.) The intending spouse could revoke the power of attorney at any time before the ceremony, but if the power had been acted on before either the other spouse or the proxy had notice of the revocation the marriage would be valid. (3.) If, however, the spouse giving the power of attorney had meanwhile lost the capacity to contract the marriage, for example, by an intervening marriage, or by becoming of unsound mind, although the marriage certificate would be prima facie evidence of the ceremony's having been performed, the court would declare the marriage null and void. The wife's petition for a decree of nullity having been dismissed, she now appealed.

John Foster for the wife.

The husband did not appear, and was not represented.

Colin Duncan for the King's Proctor. The arguments presented to the court were substantially those presented to Lord Merriman P. (1).

Cur. adv. vult.

Nov. 10. COHEN L.J. [reading the judgment of the court, stated the facts and continued :] On this evidence counsel for the wife contended that, in the circumstances above stated, it would be contrary to public policy for the English courts to recognize the validity of the marriage, and that, accordingly, his client was entitled to the decree which she sought. The

(1) [1947] P. 127.

petition was undefended, but, having regard to the importance of the matter, the President invoked the assistance of the King's Proctor, and the case was fully argued. The President in a considered judgment dismissed the petition. After a careful review of all the authorities, English and American, to which his attention had been called, he summarized his conclusions as follows (1). "My conclusions therefore are: "that the contract of marriage in this case was celebrated "in Buenos Aires; that the ceremony was performed strictly "in accordance with the law of that country; that the celebration of marriage by proxy is a matter of the form of the "ceremony or proceeding, and not an essential of the marriage; "that there is nothing abhorrent to Christian ideas in the "adoption of that form; and that, in the absence of legislation to the contrary, there is no doctrine of public policy "which entitles me to hold that the ceremony, valid where it "was performed, is not effective in this country to constitute "a valid marriage. For these reasons, whatever may be the "petitioner's remedies as a wife, I am obliged to hold that this "petition must be dismissed."

With these conclusions and with the reasons which the President gives for them we so fully agree that it is only because of the importance of the matter, and out of respect to the arguments addressed to us by counsel on both sides, that we state shortly our reasons for rejecting the arguments addressed to us for the wife. These arguments may be summarized as follows: (1.) It is contrary to the public policy of England to recognize any marriage by proxy; (2.) it is not however necessary to reach a conclusion on the first point, since in any event it is contrary to the public policy of England to recognize a marriage by proxy if (a) the party giving the proxy is domiciled in England or (b) the power of attorney conferring authority on the proxy is executed in England or (c) the power of attorney authorizes a marriage by proxy in a country where the law will recognize, as does Argentine law, the validity of a marriage contracted thereunder, notwithstanding the revocation of the proxy, if the revocation has not been communicated to the other spouse or the proxy before the ceremony takes place; and (3.) the granting of a power of attorney in England is governed as to essential validity by English law, and it is contrary to English law to recognize powers of attorney given for the purpose of celebrating a marriage.

(1) [1947] P. 127, 147.

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The first argument is, in our opinion, ill founded. Counsel was unable to suggest any statutory provision which was relevant to it. He referred us to s. 22 of the Marriage Act, 1823, which prohibits marriages otherwise than in a church or without banns or licence, but he admitted that this section only applies to marriages within the English jurisdiction: see s. 33 of the Act. A proxy marriage, such as we are considering, is clearly a Christian marriage within the definition given by Lord Penzance in *Hyde v. Hyde* (1): "the voluntary union for life" of one man and one woman, to the exclusion of all others." A proxy marriage was recognized as valid by the canon law: see Swinburne's Treatise of Spousals or Matrimonial Contracts (1686 edition, pp. 162, 163) where, as the President points out, the conditions of such a marriage are described. It is recognized as valid in a number of Christian countries besides the Argentine. The preponderance of the American authorities to which the President refers indicates that such a marriage is recognized as valid in many states of the United States of America: see especially *Ex parte Suzanna* (2). It was argued that *Reg. v. Millis* (3) precluded us from holding that such a marriage would be recognized in England, but that case concerned only marriages celebrated in England or Ireland; it did not expressly cover the point, and is in any event no authority for the general proposition that all proxy marriages, wherever celebrated, are void: see *Wolfenden v. Wolfenden* (4), where the President pointed out the limited operation of *Reg. v. Millis* (3).

Counsel for the wife invited us, none the less, to hold that proxy marriages were contrary to public policy since they would facilitate clandestine marriages, make easy the bestowal of British nationality on foreigners and the carrying on of the white-slave traffic, and make it possible for two minors to get married in, for example, Mexico, although they were both domiciled in England. So far as the argument is based on clandestine marriages, we have to bear in mind that the English courts have not regarded all such marriages as contrary to public policy: for example, Gretna Green marriages were held to be valid until they were prohibited by statute. Moreover, we have to bear in mind the frequent injunctions of the highest tribunal as to the danger of allowing judicial tribunals to roam

(1) (1866) L. R. 1 P. & M. 130, 133.

(3) (1844) 10 Cl. & F. 534.

(2) (1924) 295 Federal Reporter, 713

(4) [1946] P. 61.

unchecked in the field occupied by that unruly horse, public policy : see, for example, per Lord Atkin in *Fender v. Mildmay* (1). In any event, a consideration of what is "public policy" in a case where the matter is not governed by statute or by clearly established principle must necessarily involve balancing advantages against disadvantages. As against the considerations advanced by counsel must be weighed the following factors : (1.) The unsatisfactory position that would arise in that, if Mr. Foster is right, the parties would be married in the Argentine, the place of the intended matrimonial domicile, but not married in England ; (2.) the fact that, if Mr. Foster is right, any children that might result from the marriage would be bastards in the eye of English law ; and, above all, (3.) we should in effect be holding that the law of the Argentine was contrary to essential justice and morality, a conclusion to which we should hesitate to come : see the observations of Scrutton L.J. in *Aksionairnoye Obschestvo &c. A. M. Luther v. James Sagor & Co.* (2).

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In all the circumstances, we are satisfied that we cannot properly extend public policy to invalidate all proxy marriages. In this connexion we would respectfully adopt and apply some observations of P. O. Lawrence L.J., in *Nachimson v. Nachimson* (3), where he said, "In my opinion, it is contrary to the generally recognized rules of private international law that our courts should refuse to recognize a marriage had in a foreign country conforming in all respects to the laws of that country and to our conception of a Christian marriage merely because under the laws for the time being in force in that country the facilities for divorce happened to be far greater than in England and such as would probably not commend themselves to most English people."

Finally, on this point we would repeat the citation from Lord Dunedin's speech in *Berthiaume v. Dastous* (4), which was quoted by the President : "If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or the other spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or

(1) [1938] A. C. 1, 10.

(3) [1930] P. 217, 233.

(2) [1921] 3 K. B. 532, 557-9.

(4) [1930] A. C. 79, 83.

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“proceeding if conducted in the place of the parties’ domicile
 “would be considered a good marriage. These propositions
 “are too well fixed to need much quotation.” In our opinion,
 the method of giving consent as distinct from the fact of consent
 is essentially a matter for the *lex loci celebrationis*, and does
 not raise a question of capacity, or, as Mr. Foster preferred to
 call it, essential validity.

It will be convenient next to consider Mr. Foster’s third point, since it seems to us to founder on the same rock as his first. Counsel was constrained to admit that there was no question of incapacity in the donor of the power, or of any statutory invalidity, and that, if the power had related to a commercial transaction, its validity could not be challenged, since the act to be performed under it was valid by the law of the intended place of performance : see *Chatenay v. Brazilian Submarine Telegraph Co., Ltd.* (1), where Lord Esher M.R., said :
 “But the business sense of all business men has come to this
 “conclusion, that if a contract is made in one country to be
 “carried out between the parties in another country, either in
 “whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have
 “intended that it should be carried out according to the law
 “of that country.” See also *Sinfra A. G. v. Sinfra Ltd.* (2).
 Counsel argued, however, that this power relates to a contract of marriage, and that this is not a mere matter of contract but affects status. This is, if anything, an understatement, since the main element in the marriage contract is its effect on status : see Frazer on Husband and Wife according to the Law of Scotland (2nd ed., vol. 1, p. 170) ; but, as the status sought to be created by the proxy marriage now in question is, as we have already pointed out, that of a Christian marriage such as English law recognizes and approves, the argument does not really assist counsel and he is driven to argue that the power of attorney is bad because proxy marriages are against the public policy of England, an argument which we have already given our reasons for rejecting.

We return to the second point. In our opinion, this also fails. As regards sub-division (a) thereof, we are unable to see any reason in public policy which would require the English courts, if they recognize the validity of proxy marriages celebrated outside the United Kingdom, to deny to a person

(1) [1891] 1 Q. B. 79, 82, 83.

(2) [1939] 2 All E. R. 675, 682.

domiciled in this country the right of so celebrating a marriage, provided, of course, that he or she has in other respects capacity to marry and does not infringe any provision of English law. (b) Is really another way of stating the third argument presented for the wife. We think it impossible to hold that, in the absence of some statutory prohibition, it is contrary to public policy to execute in England a power of attorney which the same person could validly execute in the Argentine, the power of attorney being intended to authorize an act in the Argentine which is lawful by the law of that country. As regards (c), we agree with the President that this point does not arise. If a case occurs where the proxy is revoked before the ceremony takes place but the other spouse and the proxy are unaware of the revocation, it may be that the courts of this country would hold that the purported marriage was void; but that would not be because of any general objection to proxy marriages, but because, on the facts of the particular case, the court was satisfied that the marriage was not a voluntary union.

For these reasons the appeal in our opinion fails, and must be dismissed.

Appeal dismissed.

Solicitors for the wife: *Hardman, Phillips & Mann.*

Solicitor for the King's Proctor: *Treasury Solicitor.*

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Dec. 15.

Divorce—Decree nisi—Appeal—Application for security for costs—Order by Court of Appeal for payment by specified date—Appeal to stand dismissed on failure to comply with order—Non-payment due to mistake—Decree made absolute—Application to set aside—Inherent jurisdiction of court.

Scott,
Somervell and
Evershed L.JJ.

A wife, who had obtained a decree nisi for divorce against her husband applied for an order for security of her costs of an appeal by her husband and the Court of Appeal directed that security should be provided by a specified date and that in the event of failure by the appellant to provide security, the appeal should stand dismissed. Owing to a mistake on the part of the appellant's solicitors, payment of the security was not made by the date ordered, with the result that the appeal against the decree nisi stood dismissed, and in due course the decree was made absolute. On learning the facts the appellant applied to the Court of Appeal to set aside the decree absolute and reinstate his appeal.

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Held, that there was no power in the court, by virtue of its inherent jurisdiction or otherwise to set aside the decree absolute and reinstate the appeal.

Per Somervell L.J. There is no authority under which the court has jurisdiction to deprive a party of rights which he has lawfully acquired under an order of the court in circumstances of complete regularity on his part.

APPLICATION to set aside decree absolute in divorce proceedings and to reinstate appeal.

On May 31, 1947, the respondent to the present application was granted a decree nisi in divorce proceedings against her husband, the present applicant. On September 8, the applicant filed a notice of appeal and on October 13, the respondent applied to the Court of Appeal for security to be given by the applicant of her costs of the appeal, and an order was made in the following form: "It is ordered that the appellant do, on "or before October 27, procure some sufficient person on his "behalf to give security to the satisfaction of the judge in "chambers in case the parties differ, by bond to the respondent "in the sum of 50*l.* conditioned to answer the costs in case any "shall be awarded to be paid to the appellant by the respondent. But the appellant is to be at liberty instead of giving "such security as aforesaid to make on or before the said "date a lodgment in court of the said sum as directed in the "schedule hereto by cash or banker's draft. And until such "security be given or until such lodgment be made and notice "thereof given by the appellant to the appeal clerk "and to the solicitor for the respondent (such notice to be "given on the same day as the security is given or the lodgment "is made) all proceedings in the said appeal are to be stayed. "In default of the appellant giving such security or making "such lodgment as aforesaid within the aforesaid time, the "solicitors for the respondent do notify the said appeal clerk "and that thereupon the said appeal do stand dismissed out "of this court without further order." On October 26, the applicant's solicitor received a cheque from him, which included the amount of the security ordered, and on October 27 the solicitor signed a cheque for 50*l.* drawn on his firm's account, in favour of the accountant general of the Supreme Court. The cheque was paid in to the credit of the account of the accountant general on the same day. It is the practice of the Bank of England not to credit the account of the accountant general with sums paid into the bank until such cheques have been

cleared and, in consequence, the cheque was not credited to the account until November 1 by which time the date specified for the giving of security had passed. The applicant's solicitor, by an oversight, also omitted to give notice to the respondent's solicitor of the payment into court, as directed by the order of the Court of Appeal. On October 28 the respondent's solicitors learned that the security ordered had not been paid into court and that the appeal against the decree nisi, therefore, stood dismissed. They accordingly applied in the divorce registry on October 31 for the decree nisi to be made absolute and the order was duly made. The applicant's solicitors did not learn of this fact until December 1, when they attended an appointment made for the taxation of costs. The applicant thereupon made the present application by which he asked that the decree absolute should be set aside, that his appeal against the decree nisi should be reinstated and that he be granted such further and other relief as the court might think just.

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Karminski K.C. and *Franklin* for the applicant. Two questions are raised by this motion: First, how far should the appellant in the divorce proceedings be precluded from having his appeal heard as the result of a mistake made by his solicitor, and secondly, what are the powers of the Court of Appeal in regard to setting aside the decree absolute which has been granted. With regard to the first question, it is submitted that the applicant should not be made to suffer for a mistake for which he was in no way responsible, and that the court has power to vary the order which it made on the wife's application for security of the costs of the applicant's appeal. The court will not be prevented from doing justice by being unduly strict in applying its own rule. In *Ferrand v. Corporation of Bradford* (1) it was held that any judge of the court might dispense with the general orders of the court where justice required it.

[SOMERVELL L.J. There is no doubt that the court has power to modify a general order or rule, but the present case is one in which a specific order was made by the court.]

It is submitted that by analogy the same principle applies in the case of such an order.

[SCOTT L.J. There was nothing wrong with the order which was made, but it was not complied with.]

It is conceded that Or. 28, r. 11, under which a slip made

(1) (1856) 8 De G. M. & G. 93.

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by the court may be rectified, has no application in the present case, and in the absence of any apposite order, it is necessary to invoke the inherent jurisdiction of the court which made the order by virtue of which the respondent obtained the decree absolute. It is submitted that under such inherent jurisdiction the court has power to set the decree absolute aside. Such an order is not sacrosanct. It is voidable and may be declared void on an application to the court. That this is so is inferentially suggested by the terms of the Judicature Act, 1925, s. 31, sub-s. 1 (3.), which provides that no appeal shall lie from an order absolute for the dissolution of marriage by a party, who having had time and opportunity to appeal from the decree nisi, has not appealed. That section pre-supposes that in certain circumstances the Court of Appeal can entertain an appeal from a decree absolute. In *Kemp-Welch v. Kemp-Welch* (1), Evans P. said: "I am clearly of opinion that I have no jurisdiction to disturb the decree absolute which followed upon the verdict of the jury If there is any method of getting rid of the decree after it has been made absolute it is not by motion in this court." Those words also suggest that the President appeared to have in mind that the Court of Appeal might get rid of the decree although he himself had no jurisdiction to do so. In *Lloyd-Davies v. Lloyd-Davies* (2) it was stated that while an appeal against a decree nisi is pending, nothing should be done to prevent the respondent from pursuing his right to appeal. In the present case the wife has not remarried, following the granting of the decree absolute and, consequently, there is no question of any change of status, which would have been a reason for the court not interfering. In all the circumstances, it is submitted that the case is one in which the court should exercise its inherent jurisdiction and set the decree absolute aside. [They also referred to *Woolfenden v. Woolfenden* (3) and *McPherson v. McPherson* (4).]

Melford Stevenson K.C. and *Marshall Reynolds* for the respondent. There is no authority dealing with the question whether there is any inherent jurisdiction in the court which allows it to vary the order which was made in the present case. It is clear from the provisions of s. 31, sub-s. 1 (3.) and s. 184 of the Judicature Act, 1935, which deal with the characteristics of, and the consequences which follow on the making of a

(1) [1912] P. 82.

(2) [1947] P. 53.

(3) Ante p. 27.

(4) [1936] A. C. 177.

decree absolute, that there is no power to set such an order aside. [They were stopped.]

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SCOTT L.J. This case raises a very short point but an important one. [His Lordship stated the facts and continued:] It is to be observed that by the present application the court is asked to set aside the decree absolute "and to give such other relief as it thinks fit." There is no rule which covers the point we have to decide; and if either this court or the Divorce Court has power to set aside the decree absolute in the circumstances of this case, it must be in the exercise of the inherent jurisdiction of the court. It is provided by s. 31 of the Judicature Act, 1925, that "No appeal shall lie . . . (e) from "an order absolute for the dissolution or nullity of marriage in "favour of any party who having had time and opportunity "to appeal from the decree nisi on which the order was founded, "has not appealed from that decree" In my view those words inferentially cover the present case because the applicant here had time and opportunity to appeal, although, owing to the failure of his solicitors to make the necessary cash payment of the security directed, by the specified date, his right of appeal was lost in accordance with the provisions of the section. I can see no ground on which this court could set aside the decree absolute nor any reason for it to allow any extension of time for the appeal, having regard to s. 184 of the Judicature Act, 1925, which in sub-s. 1 provides: "As soon "as any decree for divorce is made absolute, either of the "parties to the marriage may, if there is no right of appeal "against the decree absolute, marry again as if the prior "marriage had been dissolved by death or, if there is such a "right of appeal, may so marry again, if no appeal is presented "against the decree, as soon as the time for appealing has "expired, or, if an appeal is so presented, as soon as the appeal "has been dismissed." In my view the policy of Parliament requires that a decree absolute should be protected unless there is some ground on which the court concerned can properly exercise its inherent jurisdiction to intervene in order that justice may be done. On the facts disclosed in this case, I cannot hold that sufficient ground exists for this court to extend the time for appeal and for that purpose to set aside the decree absolute. I think it was suggested that if time were allowed, an application could be made to the Divorce Court to set the decree aside; but that assumption is impossible; and any-

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how, that court would be in no better position than this court. In my view, the principle on which Parliament has treated the decree absolute as sacred, applies in the present case and must be acted on absolutely, because no sufficient reason exists for departing from it : there is no ground for the exercise of any inherent jurisdiction which the court may have and the application must, therefore, be refused.

SOMERVELL L.J. I agree. This application fails irrespective of the special provisions in the Judicature Act, 1925, dealing with decrees absolute, to which Scott L.J. has referred. There is one small point in the order of this court which is of some little importance. I refer to the passage which says " until " such security be given or until such lodgment be made and " notice thereof given by the appellant to the appeal clerk " . . . and to the solicitor for the respondent . . . " Unfortunately the solicitor who acted for the appellant only got the cheque from his client the day before the amount of the security ordered had to be paid, and not only was the payment not made in time, but also notice was not given to the solicitor for the respondent. Mr. Karminski, in opening the motion, referred to the matter before the court as one of varying or extending the order made by the court. On analysis, I cannot think that that is the right way of putting it. In my view, the authorities, and, indeed, Or. 70, r. 1, which deal with general orders of the court and with the question of non-compliance with them, do not assist in a case like the present which is concerned with a specific order made by this court in a particular case. Here the order was one for security for costs with a provision that if the amount fixed was not paid in by a particular day, the appeal should stand dismissed. The effect of that was, that the money not having been paid in time, the decree nisi stood and the prescribed time having elapsed could be, and was, made absolute. It was not disputed that the security was not forthcoming and that the petitioner was perfectly entitled to have the appeal dismissed and the decree made absolute. The first question is whether the court has jurisdiction to deprive a party of rights lawfully acquired under an order of this court in circumstances of the most complete regularity on the part of the party whom the court is asked to deprive of his rights. It is said that there is inherent jurisdiction to do this but I should want specific authority on the point. There is no such authority and that

fact weighs very strongly against the submission that such a jurisdiction exists. In principle, I think it is impossible to imply such a jurisdiction and, the application must therefore be dismissed.

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EVERSHED L.J. I prefer not to attempt a definition of the extent of the court's inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so. But the present case is not merely concerned with the variation or the modification of the form of an order as such, but relates to a particular order under which, in the events which have happened, a pending appeal properly stood dismissed and the petitioner in the divorce proceedings acquired the status of a person in whose favour a decree absolute for divorce had been granted. To justify this court in taking the step of putting back the clock would require something more than a variation of its order under its inherent jurisdiction. One cannot help feeling some sympathy for the applicant and his solicitor but I venture to add this: in the present case, after a five days hearing of evidence in the Divorce Court, a decree nisi was pronounced and there is at least nothing in the facts of which we have been informed to lead me to suppose that an appeal would be successful. I agree that the present application cannot succeed.

Application dismissed.

Solicitors for the applicant : *Eric B. Politzer & Co.*

Solicitors for the respondent : *Haslewood, Hare & Co.*

P. B. D.

GLAUCUS AND CITY OF FLORENCE.

1947
Dec. 10, 11,
12, 13, 15.

Shipping — Collision — Convoy — Master of one ship appointed commodore—Other vessels of convoy subject to his orders—Whistle signals to alter course in fog—Failure by other ships to answer—Damage—Liability of owners of commodore ship for negligence of master—Limits of responsibility.

Pitcher J.

Where the master of a vessel in convoy is appointed and accepts the duties and responsibilities of commodore of the convoy the owners of the vessel of which he is master are not liable to the

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owners of another vessel in the convoy for damage by collision caused by the negligent action of the commodore in performing a manœuvre proper to his duty as commodore and in his capacity of commodore.

CONSOLIDATED ACTIONS.

The owners of the Dutch motor vessel *Macuba* claimed damages from the owners of the steamship *Glaucus*, brought about by a collision between the two ships while navigating as units of the same convoy on May 4, 1943, and while approaching Malta from the south on a voyage from Alexandria via Tripoli to Malta, and alleged to have been caused by the negligent navigation of the *Glaucus*. The defendants denied negligence and contended that if there was any negligence it was not that of any of their servants, acting as such, but was that of the master of the *Glaucus* only in his capacity of commodore of the convoy and not as a servant of the defendants. They counterclaimed against the plaintiffs; and claimed against the second defendants, the owners of the steamship *City of Florence* (a vessel in the same convoy), for causing or contributing to the collision between the *Macuba* and the *Glaucus* by her negligent navigation. In a separate action the plaintiffs also claimed against the owners of the *City of Florence* in respect of the same collision and damage. The *City of Florence* did not collide with any other vessel and sustained no damage. The two actions were heard as one.

The convoy consisted of six ships and was formed in three columns of two ships in each column, the *Macuba* being the leading ship of the port column, the commodore ship *Glaucus* the leading ship of the centre column, and the *City of Florence* the leading ship of the starboard column. The convoy course was 064 degrees true and the speed at the material time about nine knots. There was a naval escort of about five destroyers. The weather had been reasonably clear but in the early morning of May 4, a bank of fog could be seen ahead and soon after 7.27 a.m. the convoy ran into it and the ships lost sight of each other as they drew quite near to the coast of Malta.

Most of the vessels were sounding prolonged blasts for fog on their steam whistles. The master of the *Glaucus*, who had been appointed at Tripoli to act as commodore of the convoy, in that capacity considered it desirable to give a safe clearance to Binghisa Reef which was on the port hand distant a few miles. He sent out in morse on the ship's steam whistle the prescribed signal "S. B." as an order for the convoy

to wheel 20 degrees to starboard. He repeated this three times and then gave the executive signal of one short blast to indicate that he was taking starboard wheel action. Neither of the other column leaders had replied to his "S. B." signals; but the *Macuba*, after some delay, was heard to give the one short blast to indicate her starboard wheel action. No signals were heard from the *City of Florence* and none was, in fact, given because she had not heard any of the *Glaucus*' signals.

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The *Glaucus* executed the 20 degrees turn but did so in two stages of ten degrees each. When his ship had completed the starboard swing, the master observed on his starboard beam, the loom of the *City of Florence* which appeared to be on a course converging on that of the *Glaucus*. To avoid colliding with her the wheel of the *Glaucus* was ported, and then hard-a-ported, and the ship swung back to port rather more than the 20 degrees of the turn first ordered. The *Macuba* then appeared on the port hand and, in spite of helm and engine action to avoid her, the two ships collided.

R. F. Hayward K.C. and *W. Porges* for the plaintiffs.

J. V. Naisby K.C. (*Vere Hunt* with him) for the first defendants, the owners of the *Glaucus*. The liability of the owners of the *Glaucus* is no different from what it would have been had there been an independent commodore on board. The master of the *Glaucus* was acting as commodore of the convoy and as master of his ship. Any negligence of which he was guilty as commodore was something for which the owners of his ship are not liable. It is axiomatic in English law that a servant can have two masters. The true test is: Who had the right to control the way in which the act complained of was done? The decision to alter the course of the convoy was that of the commodore. The decision to make the alteration to starboard and to carry it out, although no reply to the signals sent by him to the other ships had been received was made by the master in his capacity of commodore; the sending of the whistle signals was the act of the commodore; and the executive signal made to indicate helm action was made in his capacity of master. There is no case to refer to where the commodore and the master were one and the same person. The doctrine of respondeat superior was applicable here. The shipowners were not bound by the consequences of any wrongful act causing damage to third parties done by the master in his capacity of commodore.

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Counsel referred to: *The Mersey Docks & Harbour Board v. Coggins & Griffith* (1); *The Rhosina* (2); *The Sylvan Arrow* (3); *The Framlington Court* (4).

K. S. Carpmael K.C. (*R. E. Gething* with him) for the second defendants, the *City of Florence*. The *Glaucus* has not made out her case against the *City of Florence*. The *Glaucus* was to blame for the collision between the *Macuba* and herself; the *Macuba* was also blameworthy. An independent commodore would be entitled to alter the course of the convoy.

The master of the *Glaucus* was appointed commodore by the proper authority, and his responsibility as commodore cannot effectively be divorced from his responsibility as master.

Counsel referred to *The Brabant* (5).

Naisby K.C. and *Hayward* K.C. replied.

Dec. 15. PILCHER J., giving judgment, stated all the facts and, after reviewing the evidence, found that, on the facts, the *Macuba* was free from blame, that the *Glaucus* and the *City of Florence* were both to blame in equal proportions, it being impossible to distinguish between the degree of blame to be attributed to the two ships.

His Lordship said in the course of his judgment, after dealing with matters which preceded the sounding of the executive signal given by the *Glaucus*; It will be convenient here to refer to a novel point raised by the owners of the *Glaucus* in para. 3 (a) of the amended defence. Dealing with certain charges made against the *Glaucus* in regard to matters preceding that vessel's alteration of 20 degrees to starboard her owners contended that if Captain McCarthy (the master) was negligent in the respects alleged he was, in reference to these matters, acting as commodore only and not as servant of the defendants. Captain McCarthy had been appointed commodore of this small convoy at Tripoli. He accepted the position and I am satisfied that even if he had been unwilling to undertake it he could and would have been ordered to do so by the naval authorities. By accepting the position of commodore he undertook duties and responsibilities additional to those which ordinarily fall upon a shipmaster. He became responsible (*inter alia*) for deciding upon the necessity for course alterations by the

(1) [1947] A. C. 1.

(2) (1885) 10 P. D. 24, 131.

(3) [1923] P. 220.

(4) (1936) 56 Ll. L. Rep. 200.

(5) (1940) 67 Ll. L. Rep. 445.

convoy and for giving the necessary orders to the convoy for such course alterations.

I think that the contention put forward by the owners of the *Glaucus* is justified in principle. If, as was very often the case in convoys navigating under war conditions, there had been on board the *Glaucus* a naval officer acting as commodore of the convoy it is difficult to see how the owners of the *Glaucus* could have been made responsible for any damage occasioned by a negligent order given by such commodore acting within the scope of his authority as commodore of the convoy and in his capacity as such commodore. No doubt the master of a ship in convoy always remains responsible for the safety of his own ship but, in assuming the office of commodore of this convoy, Captain McCarthy undertook duties and responsibilities quite outside the duties which normally fall on the master of a ship. He undertook these duties on the orders of the naval authorities and it seems probable that he was already performing these additional duties before his owners had any knowledge that he was doing so. In these circumstances it seems to me to be quite clear that his owners cannot be responsible for any act of negligence by Captain McCarthy which can properly be said to have been a negligent performance by him of his duties as commodore of the convoy. On the facts of this case it is reasonably clear that in making the decision to alter the course of the convoy 20 degrees to starboard Captain McCarthy was acting only in his capacity as commodore. His failure to effect the alteration in clear weather, his decision not to use wireless, whether justified or not, his sounding of the "S. B." on three occasions followed by his sounding of the executive signal before receiving any reply from the column leaders, were all acts which he performed in his capacity as commodore only. If he was guilty of any negligence in regard to any of these matters and damage to third parties resulted, his owners cannot, in my opinion, be made liable for such damage on the principle of respondeat superior.

It is perhaps doubtful whether, having sounded the executive signal of one short blast in his capacity as commodore of the convoy only, Captain McCarthy must not be taken to have been acting in a dual capacity when he ordered and commenced to execute his wheel of 20 degrees to starboard. The view which I take is that this alteration was so closely linked with the sounding of the executive signal that the point of time at which Captain McCarthy commenced to act in his capacity as master

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of the *Glaucus* so as to saddle his owners with responsibility for his negligence was when, after having given the order to starboard 20 degrees, he added that the turn should be made in two stages of ten degrees. I am satisfied that he wished the turn of 20 degrees to be made slowly because he realized that the *City of Florence* had probably not heard his "S. B.'s" and that he might become involved with her, and from this point of time onwards I find that the owners of the *Glaucus* were responsible for the negligence (if any) of Captain McCarthy.

His Lordship then went on to deal with other aspects of the case.

*Judgment for the plaintiffs.
Both defendants equally to blame.*

Solicitors for the plaintiffs : *Waltons & Co.*
Solicitors for the first defendants : *Bentleys, Stokes & Lowless,*
Agents for Alsop, Stevens & Collins Robinson, Liverpool.
Solicitors for the second defendants : *Hill, Dickinson & Co.*

H. G.

Applied. CASEY v. CASEY. [1949] | *Followed.* CASEY v. | *Applied.* CHAPELLE v.
2 All E.R. 110. | CASEY. [1949] P. 420 | CHAPELLE
[1950] P. 134

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Nov. 11, 12,
13, 14 ;
Dec. 17.
Lord Greene
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Bucknill and
Somervell L.JJ.

Divorce—Nullity—Jurisdiction—English wife petitioner married in France to domiciled Frenchman—Impotence or wilful refusal of respondent—Void or voidable marriage—Residence of petitioner alone within the jurisdiction—Whether French or English law applicable.

An Englishwoman, who before her marriage to the respondent was resident and domiciled in England, married the respondent, a domiciled Frenchman, in Paris, and lived with him at various places in France and French possessions. After some years she left him and returned to England, and presented a petition for nullity on the ground of the incapacity or wilful refusal of the respondent, who appeared under protest and objected to the jurisdiction. The issue of jurisdiction was ordered to be tried separately. Jones J. held that there was no jurisdiction, and the petitioner appealed.

Held, (1.) The law applicable was French law, being that of the matrimonial domicile.

(2.) Only if the petitioner established impotence and French law treated impotence as rendering the marriage null and void in the sense that there never was a marriage, and it could be ignored by the parties and by any court without any decree of nullity, could

the English court have jurisdiction, since in that case the petitioner would never have acquired the French domicile of the respondent.

(3.) In the absence of evidence to the contrary, French law must be presumed to be the same as English, and therefore the marriage, whether incapacity or wilful refusal were proved, was voidable not void, and remained valid until annulled by decree of a competent court.

(4.) Though the decree in a nullity suit was still in the form appropriate to an earlier state of the law and declared the marriage "null and void to all intents and purposes in the law whatsoever," it could not be treated as retroactive, so as to give the petitioner, at the time of the institution of the suit, the domicile which the decree of nullity restored to her.

(5.) Though jurisdiction had been exercised in nullity suits where both parties were resident (as contrasted with domiciled) within the jurisdiction, that was no authority for the proposition that the residence of the petitioner alone would suffice.

Roberts v. Brennan [1902] P. 143; 18 T. L. R. 467; 71 L. J. (P). 74; and *Robert v. Robert* [1947] P. 164, so far as they decide the contrary, overruled.

(6.) In the circumstances, the petitioner, not having pleaded French law, ought not to be allowed a further opportunity of seeking to bring the case within para. (2.) above. The French courts formed a convenient tribunal, able to deal with all the alternative allegations, and there was no hardship in requiring the petitioner to seek her remedy there.

Decision of Jones J. [1947] P. 168 affirmed.

APPEAL from Jones J. (1).

The wife petitioner, Comtesse Mary Margaret Motley de Reneville was born in England of English parents, and was domiciled in England until her marriage. In 1935, she married the respondent, a domiciled Frenchman, in Paris, and lived with him there, at Brazzaville, in the French Congo, and at Biskra in Algeria. In 1940 the petitioner left the respondent, and returned to England, where she had since remained. She petitioned for nullity on the ground that the marriage had not been consummated owing to the incapacity or wilful refusal of the respondent. The respondent entered appearance under protest on the ground that the court had no jurisdiction to entertain the petition. An issue was directed to be tried between the respondent as plaintiff and the petitioner as defendant, to determine the question of jurisdiction. Jones J. held that there was no jurisdiction, and the petitioner appealed.

Karminski K.C. and *Victor Russell* for the petitioner. In a nullity suit brought by the wife it is sufficient that (1.) the

(1) [1947] P. 168.

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petitioner is resident in England, and (2.) that at the institution of the suit she had a domicile in England, independently of her husband when he has a foreign domicile. The respondent is admittedly French and he only entered an appearance subject to protest. In a voidable marriage such as the marriage is claimed to be in this case, it is valid for certain purposes until it is decreed to be void. It is sufficient, however, that the petitioner is resident in England and has been since before the suit was started : *Roberts v. Brennan* (1); but in *White v. White* (2) it was treated as necessary that the petitioner should be domiciled as well as resident in England. There is no difference in this respect between a void and voidable marriage. [They referred to *Armytage v. Armytage* (3) and *Le Mesurier v. Le Mesurier* (4).] The decision in *Niboyet v. Niboyet* (5) has been condemned as regards divorce proceedings but not in the case of a nullity suit.

[LORD GREENE M.R. The trouble is that the wife's intention as to domicile is immaterial. The change of domicile on marriage to a foreign husband happens whether she likes it or not.]

A wife's residence in England was not treated as sufficient in a suit for judicial separation in *Graham v. Graham* (6). But in *White v. White* (2) the crucial fact that the marriage was bigamous was assumed as giving the wife an English domicile ab initio although on a failure to establish it, the wife would not have been domiciled in this country. It is suggested that the same leap back in fixing the domicile of the wife should be made as regards a voidable marriage when a decree is being claimed for non-consummation owing to the husband's impotence. The marriages are void ab initio both in the case of a void and a voidable marriage as soon as decrees are obtained. In *Mitford v. Mitford* (7) Sir Henry Duke P. apparently took *Roberts v. Brennan* (1) to be correct, and followed it.

[LORD GREENE M.R. It seems to me that if the law applicable is that of France, one may have two positions :

(a) if the law of France is like that of Germany (which was in point in *Mitford v. Mitford* (7)) and avoids the marriage altogether, then your client never had a French domicile, for there never was a marriage ;

(1) [1902] P. 143 ; 18 T. L. R. 467 ; 71 L. J. (P.) 74.

(2) [1937] P. 111.

(3) [1898] P. 178.

(4) [1895] A. C. 517.

(5) (1878) 4 P. D. 1.

(6) [1923] P. 31.

(7) [1923] P. 130.

(b) if it does not avoid the marriage, but merely makes it voidable, your client's domicile is French.]

It seems that before the court is in a position to investigate this problem it must get determined (1.) what is the position as to incapacity? (2.) What is the French law as to domicile?

[LORD GREENE M.R. The relevant law must, I think, be either the *lex loci celebrationis* or the *lex domicilii*. I should have thought the *lex fori* was immaterial except in the sense that foreign law is assumed, till the contrary is shown, to be the same as English.]

[SOMERVELL L.J. Suppose an Englishman marries abroad, say in Belgium, according to Belgian law, and subsequently returns here and acquires an English domicile. Can he rely on the provisions of our law as to nullity or dissolution?]

It is submitted that he has two strings—*lex loci celebrationis* or *lex domicilii*.

[The question was at this point discussed whether the court could properly decide the issue before it without first having the issue of fact as to capacity or wilful refusal determined, and also evidence as to the law of France in each case. *Holroyd Pearce K.C.* said that he had a written opinion—though it was not in evidence—from a French lawyer to the effect that wilful refusal would be an “injure grave” giving a right to dissolution, but that incapacity rendered the marriage void. After an adjournment to enable the court and counsel to consider the position, LORD GREENE M.R. announced that if the parties agreed, and in order to save the hardship which might result from a complete trial possibly resulting in a decision that there was no jurisdiction, the court was prepared to deliver judgment, after the completion of the argument, on the alternative basis that the marriage was (a) void (b) voidable. The petitioner would then be in a position, assuming they came to the conclusion that jurisdiction existed in one case, but not in the other, to consider whether she could establish the facts necessary, or should abandon further proceedings, while the learned judge, if the matter went back to him, would merely have to try the questions of fact, and apply the law as they would lay it down. Counsel on both sides agreeing, *Karminski K.C.* resumed his argument.]

Hutter v. Hutter (1), *Easterbrook v. Easterbrook* (2), *Srini Vasan v. Srini Vasan* (3) and *Baindail v. Baindail* (4) were

(1) [1944] P. 95.

(2) [1944] P. 10.

(3) [1946] P. 67.

(4) [1946] P. 122.

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cited. There was no authority that the courts of one country had exclusive jurisdiction, and he was not arguing that the jurisdiction of the English courts was exclusive. There might be concurrent jurisdiction in the courts of England and France.

[SOMERVELL L.J. I have not, so far, found any trace of a dictum that the courts of the petitioner's residence can assume jurisdiction in a *voidable* marriage where the place of celebration and the domicile and residence of the party cited are all foreign.]

[LORD GREENE M.R. Suppose wilful refusal does not affect capacity to contract marriage, but is regarded as something arising *ex post facto* is it a case of applying a *lex*? It seems to me a different judicial act to declare what the status is, and to determine whether it should continue.]

Wilful refusal necessarily arises after marriage and is quite different from incapacity. The principle applicable to a void marriage applies also to a voidable marriage, and the domicile made certain by the decree relates back in either case to the initiation of the suit. The petitioner must therefore be treated as having an English domicile from the beginning of the suit.

[SOMERVELL L.J. I can understand your saying that the wife is entitled to apply for a decree of nullity, although it is only when a decree is made that she acquires an English domicile.]

There is admittedly no authority on this point in the case of a voidable marriage. The decree decides that there never was a marriage although it is true that a voidable marriage confers certain rights: *Fowke v. Fowke* (1) and *Adams v. Adams* (2). The latter of these cases is distinguishable from *Turner v. Thompson* (3).

Again it is contended that the English residence of the wife is sufficient: *Robert v. Robert* (4); see also *Roberts v. Brennan* (5) and *Armytage v. Armytage* (6).

Holroyd Pearce K.C. and *R. J. A. Temple* for the respondent. There are a number of points to put forward:

(1.) The wife is found by Jones J. to have acquired a French domicile both by choice and by law.

(1) [1938] Ch. 774.

(2) [1941] 1 K. B. 536.

(3) (1888) 13 P. D. 37.

(4) [1947] P. 164.

(5) [1902] P. 143; 18 T. L. R.

467; 71 L. J. (P.) 74.

(6) [1898] P. 178.

[LORD GREENE M.R. Was it an issue whether a French domicile was acquired by choice ?]

The point was argued at length : see as to this *Inverclyde v. Inverclyde* (1).

(2.) The wife has the husband's domicile as long as the marriage subsists. The conception of a separate domicile during the subsistence of the marriage is unknown : *Attorney-General for Alberta v. Cook* (2) and *Lord Advocate v. Jaffrey* (3).

(3.) Because the wife, if successful, will obtain a decree that the marriage has never existed, she cannot rely on the pre-ceremony domicile. The domicile acquired by marriage cannot be disregarded : *Fowke v. Fowke* (4) ; *Dodsworth v. Dale* (5).

(4.) The mere residence of the parties is not enough to give jurisdiction in case of a marriage that is voidable. Since the decree involves an alteration of status, it can only be made appropriately by the court of the domicile. *Inverclyde v. Inverclyde* (1) and *Salvesen v. Administrator of Austrian Property* (6). See also Dicey's *Conflict of Laws* (5th ed., p. 294).

(5.) Mere residence of the petitioner is not enough to give jurisdiction whether the marriage is void or voidable : *Graham v. Graham* (7) ; *Yelverton v. Yelverton* (8) ; *Sim v. Sim* (9) ; and see also Cheshire on *Private International Law*, 3rd ed., p. 457.

(6.) *Robert v. Robert* (10) it is submitted, is wrong ; and, at all events, that case and *White v. White* (11) can be distinguished.

(7.) There is no case before 1857 in which the court assumed jurisdiction in a case like this.

(8.) The court should take jurisdiction in a nullity suit where the marriage is voidable and only becomes void by decree of the court only (a) when both parties are domiciled in England ; or (b) when the marriage was celebrated in England. Both in *Roberts v. Brennan* (12) and *White v. White* (11) there was a bigamous marriage which was void without any proceedings.

[SOMERVELL L.J. Might it be possible to take the view that if the court of the domicile is available, there is no jurisdiction

(1) [1931] P. 29.

(2) [1926] A. C. 444, 465.

(3) [1921] 1 A. C. 146, 162.

(4) [1938] Ch. 774.

(5) [1936] 2 K. B. 503.

(6) [1927] A. C. 641.

(7) [1923] P. 31.

(8) (1859) 1 Sw. & Tr. 574.

(9) [1944] P. 87, 94.

(10) [1947] P. 164.

(11) [1937] P. 111.

(12) [1902] P. 143 ; 18 T. L. R. 467 ; 71 L. J. (P.) 74.

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C. A. here, but that if there is no available court of the domicile this court might entertain the suit, to prevent the petitioner being left without remedy ?]

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It is submitted that not only is there no principle on which the courts ought to act *ex necessitate*, but in the present case there is a French court available, which could issue a proper decree in rem binding on all the world.

Cur. adv. vult.

Dec. 17. The following judgments were read.

LORD GREENE M.R. The appellant (whom for convenience I will call "the petitioner") is seeking a decree of nullity against the respondent upon two alternative grounds, namely, incurable incapacity and wilful refusal to consummate the marriage. By his amended appearance the respondent protested that the court had no jurisdiction to entertain the suit for the reason that the grounds stated in the petition, if established, would render the marriage voidable but not void *ab initio*. The result, he claimed, was that the domicile of the petitioner was the same as that of the respondent who was domiciled and resident in the Republic of France.

By an order of the registrar confirmed by the judge it was ordered that an issue be tried as to the jurisdiction of the court, the respondent to be plaintiff and the petitioner to be defendant. The petitioner as defendant in the issue by her answer to the amended appearance asserted that if either of her alternative grounds was established the court would declare the marriage to be absolutely null and void to all intents and purposes in law whatsoever, that the effect of the declaration would be that the petitioner was never married to the respondent and never acquired his domicile but retained her own English domicile, that the domicile of the respondent was not an essential ingredient to found the jurisdiction of the court and that at all material times she was resident in England. The reply of the respondent was a formal one.

The issue was tried before Jones J. on May 20, 1947, and he gave judgment on May 22. By some inaccuracy in drawing up the formal judgment it wrongly described the issue as "the issue as to domicile" instead of the issue "as to jurisdiction." At the hearing the only evidence given was that of the petitioner.

The facts as found by Jones J. were, shortly, as follows.

The respondent is a Frenchman domiciled and for many years resident in the Republic of France. The petitioner is an Englishwoman and lived in England before her marriage. The marriage was celebrated in Paris on August 1, 1935, at the Mairie, 6th Arrondissement. Apart from a few months spent in England with friends or relations in the year 1938 the parties lived together in various places where the respondent held a military appointment in the French armed forces—Paris, the French Congo and Biskra in Algeria. At the outbreak of war in 1939 the petitioner returned to England leaving the respondent in Biskra. In April, 1940, she went to Biskra as the respondent was seriously ill and she stayed there for six weeks. She then returned to England where she has lived ever since apart from the respondent. I may supplement these findings by saying that from the evidence it is clear that when she left the respondent in 1940 she intended never to return to him.

Jones J. held that a marriage subsequently annulled on the ground of incapacity is a voidable one, that until avoided it is a valid marriage, that on the marriage the petitioner acquired the domicile of her husband and still retained it and that her case on the issue so far as it rested on domicile failed accordingly. On the alternative ground put forward as a basis for exercising jurisdiction, namely, that of residence of the petitioner, Jones J. held that the residence of a petitioner within the jurisdiction was insufficient when the respondent in the cause was resident abroad, at any rate when the respondent protested to the jurisdiction and (as he found here) no hardship was involved. Jones J. evidently regarded the wife's alternative ground of wilful refusal as involving that the marriage was voidable and not void as indeed, if English municipal law applies, he was bound to do in view of the language of s. 7, sub-s. 1, of the Matrimonial Causes Act, 1937.

Before the argument before us had proceeded very far, it appeared that the procedure adopted of trying the question of jurisdiction on a preliminary issue, although no doubt a proper one, did in the special circumstances of the case lead to certain inconveniences. Two alternative matters of fact are alleged in the petition as grounds for a decree of nullity; neither of which was or could be proved or admitted on the trial of the issue. On one view of the law it appeared possible that our decision might be different according as the one or the other of these alternative allegations might be established. Thus, in so far as the answer to the issue as to jurisdiction might depend on

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domicile the question what was the domicile of the petitioner at the institution of the suit might, as it seemed to us, depend on whether the marriage was a void or a voidable one, a question which, in its turn, might fall to be determined by the law of France on the ground either that the marriage was celebrated in that country, or that the matrimonial domicile contemplated by the parties was French. If under French law the marriage was void the result, as it then appeared to us, might well be that the domicile of the petitioner was English at the institution of the suit, a fact which, if established, would, according to some authority, give the English court jurisdiction to pronounce a decree of nullity. When these various possibilities and complications were adumbrated, the further difficulty emerged that so far as the trial of the issue was concerned no question of French law had been pleaded or raised in any way and that in so far as any question has to be decided by reference to French law, that law must on ordinary principles in the absence of proof to the contrary be assumed to be the same as English law. On this basis the question whether the marriage was void or voidable would ultimately have to be decided in accordance with provisions identical with those of English law.

As the result of some discussion, counsel on both sides were anxious, as was the court itself, to avoid the waste of money which would have been involved if the whole matter including the issue of jurisdiction had been sent back for trial. Accordingly, with the consent of counsel for both parties, we decided that the appeal should proceed on the basis that we would decide the question of jurisdiction on two alternative hypotheses, one that the marriage was void and the other that the marriage was voidable.

Various grounds have been suggested as forming foundations for the exercise of jurisdiction in nullity cases by the courts of this country. They may be listed as follows: (1.) English domicile of both parties. (2.) English domicile of the petitioner alone. (3.) English residence of both parties. (4.) English residence of the petitioner alone. (5.) The fact that the marriage took place here. (6.) Hardship. We are not concerned here to consider cases (3.), (5.) or (6.). "Whether there cannot be jurisdiction which is not that of the domicile in restricted instances to entertain a suit for nullity is a question we have not before us for determination," said Lord Haldane in *Salvesen v. Administrator of Austrian Property* (1). This

(1) [1927] A. C. 641, 654.

doubtful question remains to be answered by the House of Lords, and there is no need for us to attempt to answer it for the purposes of this appeal. I shall endeavour to confine myself to the questions actually raised.

The case presented on behalf of the petitioner was to the following effect. (A.) It was said that in so far as the basis of jurisdiction is to be sought in domicile alone, the domicile of the petitioner is sufficient: that if the marriage was a void marriage, the petitioner had never lost or alternatively had resumed her English domicile of origin before the institution of the cause; that even if the marriage was only voidable, the effect of a decree of nullity would be to render it void ab initio, with the result that for the purposes of jurisdiction the petitioner ought to be regarded as already possessing the status of spinsterhood which, it was said, a decree would give her by its retroactive operation; and that accordingly, the fact that the respondent was domiciled in France is irrelevant on the question of jurisdiction.

(B.) Alternatively, it was said that if the petitioner's case as to jurisdiction based on domicile cannot be supported, the court has jurisdiction by reason of the fact that at the inception of the suit she was resident in England and notwithstanding the fact that the respondent was then, as he still is, resident in France. I will deal with these two alternatives in the order in which I have stated them.

(A.) That the courts of the country in which the parties are domiciled have jurisdiction to pronounce a decree of nullity whether the parties were or were not married in that country is set beyond doubt by the decision of the House of Lords in *Salvesen v. Administrator of Austrian Property* (1). It will be noticed that I have said "the parties" since in that case as in most other cases in which domicile as a basis of jurisdiction has been discussed the domicile of the parties was the same. In nullity cases the parties will have the same domicile at the date of the institution of the suit in one of two events, namely (1.) if the marriage is by the proper law voidable and not void, in which case the wife will have acquired the same domicile as the husband by the mere fact of marriage and retains that domicile until the marriage is annulled. (2.) If the marriage is void but nevertheless the wife on the facts acquired a domicile of choice in the country contemplated as that of the matrimonial domicile and has not subsequently changed that

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domicile. This occurred in the *Salvesen* case (1), where the wife acquired in fact the husband's German domicile and therefore it was unnecessary to consider what the position would have been if the marriage had been a void marriage and the domiciles of the parties had been different. Throughout the opinions delivered in that case the word "parties" in the plural is used, and it is right to point out that Lord Phillimore, said (2) that as to matters of status "the law which regulates or determines "the personal status of the parties, if they are both subject to "the same law, decides conclusively." I do not, however, read this as an expression of opinion on a point which did not arise and was not for consideration, namely, has such a court jurisdiction where one only of the parties is subject to its law, that is, domiciled in its country. I will return to this later.

So far as English law is concerned there is a clear distinction between void and voidable marriages. "Wilful refusal" is by s. 7 of the Matrimonial Causes Act, 1937, a ground for treating the marriage as voidable, not for treating it as void. In an earlier statute the same distinction appears. Previously to the Act 5 & 6 Will. IV, c. 54, a marriage within the prohibited degrees was voidable: it could only be annulled in the lifetime of the parties and by a decree of an ecclesiastical court. (See *Brook v. Brook* (3), per Lord Cranworth and per Lord Wensleydale.) The result was that unless and until such a decree had been obtained the status of children of the marriage could not be definitely known during the lifetime of their parents. The Act remedied this state of affairs by prescribing that such marriages should be absolutely void.

In what, for present purposes, does the distinction consist? It is argued that there is no real distinction by reason of the fact that in each case the form of the decree is the same and pronounces the marriage "to have been and to be absolutely null "and void to all intents and purposes in the law whatsoever." It is perhaps unfortunate that a form of decree which was appropriate when a marriage was regarded as indissoluble and could only be got rid of by decreeing that it had never taken place is still used indiscriminately in the cases of both void and voidable marriages. It is particularly anomalous in the case of the new grounds of nullity laid down by the Act of 1937. In *Inverclyde v. Inverclyde* (4) Bateson J., rightly in my opinion, insisted on the necessity of looking behind the form and

[1] [1927] A. C. 641.

(2) Ibid. 670.

(3) (1861) 9 H. L. C. 193, 222, 240.

(4) [1931] P. 29.

regarding the substance of the matter. The substance, in my view, may be thus expressed : a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it : a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction. In England only the Divorce Court has this jurisdiction. The fact that in both cases the form of the decree is the same cannot alter the fact that the two cases are in this respect quite different. This difference is illustrated by the Act 5 & 6 Will. IV. c. 54, to which I referred a moment ago. Before that Act a marriage within the prohibited degrees could only be got rid of by a decree of an ecclesiastical court. Subsequently to the Act every court was bound to treat it as never having taken place. Other illustrations of the effect of the distinction are to be found in *Adams v. Adams* (1), *Dodworth v. Dale* (2) and *Fowke v. Fowke* (3).

In the present case the question whether at the relevant date the petitioner had an English domicile cannot, in my view, be answered until two other questions are answered, namely (a) was the marriage a void or voidable one, and (b) by reference to what law will the English court decide whether it was void or voidable ?

The importance for present purposes of the distinction between " void " and " voidable " lies in this. If the marriage was voidable it must, in my opinion, be regarded as having had the effect of giving to the petitioner, as a matter of law, the French domicile of her husband and as precluding her from casting off that domicile before a decree of annulment is actually pronounced. It appears to me to be quite impossible to suggest that she is to be treated as having resumed, proleptically, so to speak, her English domicile, merely because she has presented a petition for a decree of nullity to which, in point of substance, she might or might not be able to establish her claim. To hold otherwise would be to allow oneself to be misled by the mere wording of a form of decree which was adopted in the past for reasons which are no longer appropriate. The fact that a domicile has been acquired by reason of a voidable marriage is a fact the existence of which cannot be undone by a declaration

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(1) [1941] 1 K. B. 536, 540, 541. (3) [1938] Ch. 774.

(2) [1936] 2 K. B. 503.

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If, however, the marriage is by its proper law a void marriage no decree of any court is required to avoid it. The petitioner in that case did not acquire the French domicile of the respondent by operation of law ; she was free to acquire it or not as she chose and, if she acquired it, to abandon it or change it for a different domicile of choice. It is clear on the facts that if she was competent to do so she did abandon her French domicile (which I am assuming she had acquired) and that she thereby resumed her domicile of origin, which was English. Her domicile, therefore, on the hypothesis that the marriage was void, was English. This at once raises a question as to the jurisdiction of the English courts to entertain a petition for nullity by a supposed wife who is in a position to prove that her supposed marriage was void and that her domicile on that basis is English at the date of the presentation of the petition. This situation seems never to have arisen before the case of *White v. White* (1) which was decided by my brother Bucknill when a judge of first instance. Before I examine that case I must point out that we are not on this hypothesis concerned to do what I have declined to do in the case of a voidable marriage, namely, to give to a decree of nullity which it is assumed will be obtained what I have called a proleptic operation in conferring on a wife a domicile which, until she obtains the decree she is seeking, she is incapable in law of possessing. In the present case, if the marriage was void, the domicile of the petitioner is English : it would be held to be English by any court in the country before whom the relevant facts were established, for example, in matters of succession no decree of the Divorce Court would have to be produced in order to show that she had possessed that freedom in the choice of a domicile which the law denies to a woman so long as her status is that of a married woman. The fact that she has an English domicile can be established in the nullity proceedings themselves, as she attempted to establish it here, on a preliminary issue, whereas if all she could show was a voidable marriage, the trial of a preliminary issue could only result in a finding that at the date of the presentation of the petition she was domiciled in France.

(1) [1937] P. 111.

In *White v. White* (1) my brother Bucknill used words with which (save as regards the reference to residence which was in my opinion unnecessary) I respectfully agree. He said: "It seems to me just to the petitioner and also in the public interest that the petitioner, being domiciled and resident in this country should have her status as a single or as a married woman judicially established by this court." This view does, of course, theoretically at least, open up the possibility of conflicting judgments by the courts of the respective domiciles. But if it be not the right view, and if the only court with jurisdiction is a court in a country where both are domiciled, the problem of jurisdiction based on domicile in the case of a void marriage where the domiciles are different would appear to be insoluble. Bucknill J. attached importance to the fact that the respondent in *White v. White* (1) had not objected to the jurisdiction. With great respect, I cannot agree with this. In the case before him the English domicile of the petitioner did, in my opinion, give the court jurisdiction whether or not the petitioner objected. Moreover, I should have thought that on principle the exercise of jurisdiction in matrimonial causes affecting status could not depend on the submission of the respondent or his refusal to submit to the jurisdiction. In the present case, if the marriage was void and not merely voidable, the fact that the respondent has protested cannot, in my opinion, deprive the English court of jurisdiction to declare the status of a domiciled English woman. Conversely, if the marriage is voidable only, no such jurisdiction exists and could not be created by the fact, if fact it had been, that the respondent had not protested.

But the problem remains, by what law ought the question whether the marriage was void or merely voidable to be determined? If by English municipal law alone, the answer to the present appeal is, in my opinion, a clear one. Whichever of the grounds on which the petition is based is made good the marriage is a voidable marriage and the English court, as Jones J. rightly held, has no jurisdiction. That marriages governed by English law are, on the ground of incapacity, voidable and not void must now, I think, be accepted (see *Turner v. Thompson* (2), *Inverclyde v. Inverclyde* (3) and *Adams v. Adams* (4)). Wilful refusal, as I have said, makes the marriage voidable only. Neither in the pleadings nor on the

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(1) [1937] P. 111, 125, 126.

(2) (1887) 13 P. D. 37.

(3) [1931] P. 29.

(4) [1941] 1 K. B. 536, 542.

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trial of the issue was any reference made to any law other than English law. If the true view be that the question into which class the marriage falls is for French law to decide, either because the marriage was celebrated in France or because the husband's (or the matrimonial) domicile was French, then the court has not been put into possession of what, in my view, would be a crucial matter of fact.

In my opinion, the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage. In *Brook v. Brook* (1) a case in which the marriage in Denmark (by the law of which country, assuming it applied, it was valid) of two persons domiciled in England was held to be void on the ground that although the *lex loci* governed the forms of marriage its essential validity depended on the *lex domicilii* of the parties. Lord Campbell L.C. said this (2): "But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated." In the case of a void marriage, the matrimonial domicile contemplated will clearly be the same as that contemplated in the case of a voidable or non-voidable marriage, since the parties presumably intend to live together. In the present case, the matrimonial domicile was clearly French, and it is, in my opinion, to French law that the question whether the marriage was void or voidable on the grounds alleged must be referred. In the *Salvesen* case (3), the provision of French law by reference to which the German Court had annulled the marriage was one which was regarded, apparently, as relating to form and not to substance. "The validity of the marriage depended on French law, that being the law of the *locus celebrationis*," per Lord Dunedin.

(1) 9 H. L. C. 193.

(3) [1927] A. C. 641, 663.

(2) Ibid. 207.

I may summarize my conclusions on the question of jurisdiction as based on domicile in the following manner : (I.) If (contrary to my view) English municipal law applies as such, or if that law is applicable on the basis that French law is or must be deemed to be the same as English law (a) the marriage was voidable only and not void whichever ground put forward for annulling the marriage be taken. (b) The domicile of the petitioner was French at the date when the suit was instituted. (c) The domicile of the petitioner cannot be notionally regarded as other than French : it remains French until a decree of nullity is pronounced by a court of competent jurisdiction. (d) The only competent courts are the courts of France.

(II.) If, as in my opinion is the case, the question whether the marriage is void or voidable is to be determined by reference to French law then (a) if by that law (as theoretically, at least, is possible) it is void on both the grounds put forward, the English court has jurisdiction to pronounce a decree whichever of those grounds is established, (b) if by that law the marriage is void on one ground (for example, impotence) but voidable on the other (for example, wilful refusal) the English court has jurisdiction to pronounce a decree on the ground of impotence, but if that is not established, it has no jurisdiction to pronounce a decree on the ground of wilful refusal, (c) if by French law the marriage is in both cases voidable and not void the English court has no jurisdiction.

I have pointed out the difficulty which arises by reason of the applicability of French law and the omission to appreciate its applicability. But I think that in the circumstances the petitioner ought to have an opportunity of submitting (if she be so advised) that the issue should be sent back to the judge to ascertain whether by French law the marriage is void or voidable for either and if so for which of the two reasons put forward in the petition. The decision of the judge on this question, should we consider that the petitioner ought to be allowed to raise it, would carry the consequences which I have indicated. We will hear argument on this matter when my brethren have delivered their judgments. I may add that it would be for the English court, after hearing evidence of French law, to decide whether in French law the marriage was void or voidable not merely in a verbal sense but in the sense of the words as understood in this country, that is, as indicating or not indicating as the case might be, that the marriage would be regarded in France as a nullity without the necessity of a decree annulling it.

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So much for the question of domicile. I turn now to (B.), the alternative ground of residence. I will assume that residence of both parties (a matter left open, as I think, by the House of Lords in the *Salvesen* case (1)) is sufficient to found jurisdiction. Is the residence of the petitioner alone sufficient? I agree with Jones J. that it is not.

Mr. Karminski, for the petitioner, placed in the forefront of his argument the decision of Jeune P. in the case of *Roberts v. Brennan* (2). This was a case of bigamy and the wife was petitioning for a decree of nullity. The ceremony was performed in the Isle of Man. The domicile of the man was Irish; the woman was born in Wales. Some two and a half years later the man confessed that at the date of the ceremony he was already married. As a result the woman left the man in Glasgow. It does not appear where she was domiciled at the date of the petition, but as the marriage was a bigamous one, she was entitled to acquire any domicile she liked: if her domicile was English, the English court had, if my view is right, jurisdiction on that ground. But Jeune P. said that in nullity cases jurisdiction is based not on domicile but on residence. Before the woman left the man they had lived together in the Isle of Man, in England and in Scotland. The report is unsatisfactory. Although it was decided that the court had jurisdiction on the ground of residence, the facts as regards the residence of the respective parties at the date of the presentation of the petition are nowhere stated in the report in the Law Reports. The case is, however, reported in The Times Law Reports, where it appears that the man was served with the petition in Ireland. Horridge J. in a later case discovered that the petitioner had given an English address (*Graham v. Graham* (3)). The "residence" referred to by Jeune P. cannot have been the temporary residence in England before the parties went to Scotland that is referred to in the statement of facts. In The Times Law Reports, Jeune P., is reported as having said that the jurisdiction of the ecclesiastical courts would have depended upon the "matrimonial residence" of the parties. In the Law Reports the word "matrimonial" does not appear. The decision is also unsatisfactory in that it excludes domicile as a basis of jurisdiction. In this the decision was clearly wrong. In any case I am quite unable to

(1) [1927] A. C. 641.

(3) [1923] P. 31, 37.

(2) [1902] P. 143; 18 T. L. R.

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accept *Roberts v. Brennan* (1) as an authority for the proposition that the mere residence of a petitioning wife in England is sufficient to give the court jurisdiction to entertain a nullity suit when the respondent husband is not resident here. If it be thought that *Roberts v. Brennan* (1) does so decide, I am unable to agree with it.

On the question of residence as a basis for jurisdiction, reliance was also placed on *White v. White* (2). That again was a case of bigamy. The ceremony took place in Australia when the man had a wife alive. The petitioner was "domiciled and resident" in England and the respondent was "domiciled and resident" in Australia or Malta. These statements in the report I read as referring to the time of the Australian ceremony. The respondent did not appear. As the marriage was a void marriage, Bucknill J. had no difficulty in finding on the facts that the woman petitioner was domiciled in England at the date of the petition. This circumstance, in my opinion, as I have said, was sufficient to give to the English court jurisdiction to determine her status by a decree in a nullity suit, that court being the court of her domicile and thereby a court competent to determine her status. The judgment refers to the fact that the petitioner was both domiciled and resident here, but the reference to residence was, as I have said, in my view unnecessary for the decision. I cannot read this decision as meaning that residence of the petitioning wife alone is sufficient to found jurisdiction on the ground of residence even in the case of a void marriage.

In *Hutter v. Hutter* (3) Pilcher J. had to deal with a petition by a husband for nullity of a marriage celebrated in England which had never been consummated owing to the wilful refusal of the wife. The husband was domiciled in the U.S.A. Wilful refusal was proved. Both parties were resident in England at the date of the petition. The actual decision was that the court had jurisdiction, the short ground being stated as follows: "It would seem, therefore, that both on principle and on authority there is good ground for saying that in suits for nullity the mere residence of the parties in this country is sufficient to found the jurisdiction of the court." This case is no authority for the view that residence of the petitioner alone is sufficient.

In *Robert v. Robert* (4) the parties were domiciled and the

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(1) [1902] P. 143; 18 T. L. R. (3) [1944] P. 95, 103.

467; 71 L. J. (P.) 74.

(4) [1947] P. 164.

(2) [1937] P. 111.

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respondent husband was resident in Guernsey. The wife, who was petitioning for a decree on the ground of wilful refusal by her husband, was resident in England. Barnard J. held that the residence of the wife was sufficient to give him jurisdiction to entertain the suit. In so holding, Barnard J. was, in my respectful opinion, in error, and the case of *White v. White* (1) which he relied on does not support his decision.

These are the only authorities which appear to touch upon the point of residence of the petitioner alone and without expressing an opinion upon the question whether residence of both parties within the jurisdiction is sufficient, I am clearly of opinion that they cannot be accepted as establishing the proposition contended for. That a wife who is resident but, ex hypothesi, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this country appears to me to be contrary both to principle and to convenience.

BUCKNILL L.J. In this case the husband entered an appearance under protest to the petition by the wife on the ground that this court had no jurisdiction to entertain the suit. He further submitted that the allegations in the petition, if established, would render the marriage, which was not celebrated in England, voidable but not void ab initio, and therefore that the wife's domicile could not be other than the husband's domicile, who was at all material times domiciled and resident in France.

On the application of the wife the court ordered the trial of the issue as to the jurisdiction of the court. The wife in her plea admitted that the husband was at all material times domiciled in France but contended that his domicile here was not essential to found the jurisdiction of this court. In support of this contention the wife submitted that if either of her allegations as to impotence or wilful refusal were established the court would declare the marriage to be absolutely null and void and that the result of this declaration would be that the wife never acquired the husband's domicile but retained her English domicile. Having regard to this fact and to the fact that she was at all material times resident in England the wife asserted that this court had jurisdiction to entertain her petition for a declaration of nullity.

(1) [1937] P. 111.

On May 22, the judge gave judgment that the court had no jurisdiction to hear the suit.

On appeal this court during the hearing intimated to counsel that if the marriage was not consummated owing to the impotence of the husband it might be argued that the marriage was void ab initio by French law and that the question of jurisdiction in such a case might not turn on the same considerations as would apply if the marriage was merely voidable. The court therefore could not decide whether it had jurisdiction until the cause of the non-consummation of the marriage had been established and also until it had been decided what law would be applicable in each case. With the consent of both counsel and in order to avoid costs being thrown away the court agreed to deal with the question of jurisdiction on two alternative hypotheses: (1.) that the husband was incurably impotent, and (2.) that the husband had wilfully refused to consummate the marriage, and on two further hypotheses, namely, that (a) English law or (b) French law applied to the case.

The main questions for the consideration of the court seem to me to be these: (1.) According to English law does incurable impotence render the marriage void ab initio, in the same way for instance that a marriage is void ab initio if one of the parties is already married? (2.) According to French law does incurable impotence render the marriage absolutely void ab initio in the same sense as in question 1? (3.) Assuming that by English law incurable impotence renders the marriage voidable and not void, but that French law renders the marriage void ab initio in the same sense as in question 1, ought this court, when deciding whether it has jurisdiction to make a decree of nullity on the ground of incurable impotence, to apply English or French law as to the legal effect of impotence on the validity of the marriage? (4.) If the marriage is not void but voidable either by French or English law, ought the English court to exercise jurisdiction in this case?

In my opinion the right answer to the first question is that such a marriage is not void ab initio but voidable, notwithstanding the form of the decree which declares that "the marriage was null and void ab initio." This form was used by the House of Lords in *Lewis v. Hayward* (1). The form of decree in use in the Divorce Division is somewhat different and is that "the marriage in fact had and solemnized be pronounced and declared to have been and to be absolutely

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“ null and void to all intents and purposes in the law whatsoever . . . and that the petitioner be pronounced to have been and to be free from all bond of marriage with the respondent unless sufficient cause be shown to the court why this decree should not be made absolute.” Notwithstanding the retrospective nature of the decree there are several decided cases to the effect that if the parties to the marriage ceremony are legally competent to enter into it and the ceremony is legally performed, the law regards it as a valid marriage until a decree is made annulling it on the ground of impotence. On the other hand the decree of nullity is retrospective in some respects, and the decided cases are not easy to reconcile on the point as to how far the decree makes invalid past acts. The matter is thoroughly examined by Andrews C.J. in his considered and helpful judgment in *Mason v. Mason* (1). In my opinion incurable impotence is a physical defect which may not be established as a fact until after the lapse of years of trial and medical treatment. Thus, in *Lewis v. Hayward* (2) already cited, the parties lived together for fourteen years and during nearly the whole of the time occupied the same bed. During those years the parties should surely be regarded in the eyes of the law as man and wife. To hold otherwise would be in my opinion contrary to public policy and to common sense.

The statute of 1937 makes wilful refusal to consummate the marriage a ground for avoiding the marriage, together with other grounds on which a marriage may be voidable. Such refusal and the physical or mental incapacity to tolerate sexual intercourse, which may be taken as evidence of impotence, are so closely allied, that in my opinion it would be an error to make one a ground for saying that the marriage is void ab initio, and the other a ground for saying that the marriage is voidable.

An authority on the point is the decision of Bateson J. in *Inverclyde v. Inverclyde* (3). In that case the wife petitioned for nullity of marriage on the ground of the impotence of her husband. The marriage took place in London on March 21, 1929 and on August 1, 1930, the wife filed her petition. The petition alleged that at the time when the petition was filed both parties were domiciled in Scotland. The wife alleged that she was resident in England and that the husband had places of residence both in England and Scotland. The husband

(1) [1944] N. I. 134, 159.

(3) [1931] P. 29.

(2) 35 L. J. (P.) 105.

appeared under protest to the jurisdiction, and took out a summons asking for the dismissal of the petition for want of jurisdiction on the ground of the Scottish domicile of both parties and on the ground that the question involved in the petition was whether a voidable marriage should be declared void. It was argued on behalf of the husband that the petition was akin to one for divorce and that the only forum was that of the domicile.

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Bateson J. in his judgment said (1) that the question for his determination was whether the court had jurisdiction to try a suit for nullity on the ground of impotence when the parties were domiciled abroad. He said that: "The marriage being voidable and not void and the decree affecting and involving an alteration of status and being a judgment in rem binding on all the world, there can be no jurisdiction in this court unless the parties are domiciled in this country To call it a suit for nullity does not alter its essential and real character of a suit for dissolution."

Bateson J. referred to the case of *Roberts v. Brennan* (2). In that case, Sir Francis Jeune P. granted a decree of nullity on the ground of residence within the jurisdiction, and the basis of the petition was that it was a bigamous marriage. With reference to this case, Bateson J. said: "In truth bigamy cases help very little, as in them as distinct from this there never has been a marriage and the argument that there is no distinction between the two classes of cases seems to me untenable."

Question No. 2. The answer to the question whether by French law incurable impotence renders the marriage void ab initio, cannot be given until the evidence has been tendered on the point to the court. In the absence of any evidence to the contrary this court presumes that French law is the same as English law on the point.

As regards question 3: In my view the English court should be guided by French law. The wife consented to marry her husband in France and intended to live with him there and also impliedly intended to take her husband's French domicile on the assumption that the marriage was valid. Under these circumstances it seems to me that the question as to the validity of the marriage should be decided by French law. I do not see any good reason why it should be decided by English law.

(1) [1931] P. 29, 41, 48.

(2) [1902] P. 143; 18 T. L. R. 467; 71 L. J. (P.) 74.

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True, the wife's domicile before marriage was English, but on the other hand, her husband's domicile was French ; and, the two parties to the marriage having different domiciles, it seems to me that the law of France should prevail. To hold that the law of the country where each spouse is domiciled before marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. For this reason I think it essential that the law of one country should prevail and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they in fact lived together, should be regarded as the law which controls the validity of their marriage. Assuming, therefore, that by French law the marriage is void ab initio, in the sense that a marriage is void ab initio because one of the parties is incapable of entering into a valid marriage, the petitioner then would not be the respondent's wife, and has not lost her English domicile, unless she has done so in fact by making France her permanent home.

In such a case I think this court should exercise jurisdiction. I do not know of any authority directly in point. In *White v. White* (1) the court assumed jurisdiction to make a decree of nullity in the case of a void marriage on the ground of bigamy, because the petitioner wife was domiciled and resident in England.

In *Mehta v. Mehta* (2), Barnard J. exercised jurisdiction and declared void a so-called marriage which had taken place in Bombay. The petitioner wife was at all material times domiciled in England, the respondent was an Indian, and the case made by the petitioner was that she had no intention of marrying the respondent and misunderstood the nature of the ceremony, which the judge held was a fraud perpetrated upon the petitioner.

The only other court, in cases of nullity ab initio, and where there is no common or matrimonial domicile in fact, seems to be the court of the country where the marriage was celebrated. But such a court might be extremely inconvenient to both parties and if neither party were domiciled or resident in the country, it is difficult to see what interest that country would have in their matrimonial status.

As regards question 4. If the marriage is merely voidable

(1) [1937] P. 111.

(2) (1945) 174 L. T. 63.

by French or English law, either for impotence or wilful refusal, the marriage in my view is a valid marriage until a decree is made annulling it. Therefore the wife has the domicile of her husband by operation of law and the court should regard that as the test when considering whether it has jurisdiction. It is not necessary to decide in the present case the question whether the court will exercise jurisdiction over voidable marriages where both parties have merely a permanent residence within the jurisdiction, or where the marriage has taken place within the jurisdiction, because, as I have already said, the husband did not at any time have such a residence in England, and certainly was not residing in this country and was not even present in it when the petition was filed. The marriage in this case was celebrated in Paris. I do not think the fact that the wife before marriage was domiciled within the jurisdiction, and is resident here at the time when the petition is filed is sufficient in a voidable marriage to confer jurisdiction on this court where the husband is domiciled and at all material times resident abroad.

For these reasons the appeal, in my opinion, should be dismissed, unless the petitioner asks that the case be remitted to the trial judge for evidence to be taken as to French law on the question of the effect of impotence upon the validity of the marriage.

SOMERVELL L.J. I agree. The reasons which have led me to the conclusion that this appeal should be dismissed have already been expressed and, if I may say so, very fully and clearly expressed, in the judgment delivered by the Master of the Rolls, and I do not desire to add anything to what he has said.

LORD GREENE M.R. Mr. Karminski and Mr. Holroyd Pearce, the result therefore is that on the issue as formulated in what I may call the pleadings, and as fought, this appeal fails. The only question we have left for discussion is whether or not the petitioner ought to be allowed, if she thinks right to ask for it, to re-open the issue by reason of the lack of evidence of French law. It is desirable to make clear, if it is not clear from the judgment, that if she obtained that leave, and if she established by evidence of French law that in one event the marriage would be void, and on the other of her alternative grounds voidable only, and she failed to establish the facts on which the voidness

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of the marriage depended, she would be precluded from claiming that the court had jurisdiction to decide her petition on the other ground on which it would be voidable. In other words, she would take that risk if she decided to try to get the matter heard here. She could only succeed, if at all, on a ground which the French law declared would render the marriage void.

After hearing argument on this question,

LORD GREENE M.R. said: In this case the petitioner throughout has based her claim on the provisions of English law. We have taken the view that the fundamental question whether the marriage was or was not void is a matter for French law. No such point has been raised in the issue so far either on the pleadings or in the issue as heard and decided. We consider that to allow that point to be reopened now by sending the issue back to have it decided would be inconvenient, unfair to the respondent and, so far as the petitioner is concerned, would be of highly doubtful value because the probabilities at any rate appear to me to be very strong that if French law decided that the marriage was void, it would do so only on one of the two alternative grounds alleged. In consequence, a failure on that issue if it were tried here would not settle the matrimonial differences of the parties because the petitioner would then have to go to France if she wished to continue on the other issue. I cannot myself imagine anything more inconvenient or anything which would be such a misfortune for the petitioner herself.

In all the circumstances of the case, we consider that the petitioner should not be allowed to reopen this issue, with the result that in accordance with our judgments the appeal is dismissed with costs.

Appeal dismissed.

Solicitors for petitioner : *Charles Russell & Co.*
Solicitors for respondent : *Peacock & Goddard.*

J. W. H.

Explained and applied. *MACRAE v. MACRAE*. [1949] 1 All E.R. 290.

Applied. *MACRAE v. MACRAE*. [1949] 2 All E.R. 34.

Distinguished. In re 125
DULLES SETTLEMENT
[1951] 1 Ch. 265

Followed. *MACRAE v. MACRAE*.

[1949] P. 272

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Followed. *MACRAE v. MACRAE*. [1949] P. 397

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Oct. 16, 17;
Nov. 10.

Tucker,
Bucknill
and Cohen L.JJ.

Husband and wife—Desertion—Wife's complaint to justices—Husband domiciled and resident in Scotland—Jurisdiction—Husband's representation before justices—Effect on right to challenge jurisdiction on appeal—Summary Jurisdiction Act, 1848 (11 & 12 Vict., c. 43), s. 1—Summary Jurisdiction (Process) Act, 1881 (44 & 45 Vict., c. 24), s. 4—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), s. 4.

A wife complained to justices that her husband, who was domiciled and resident in Scotland, had deserted her there by remaining there after she had come to England on the understanding that he would follow her. There was no evidence that the husband was ever in England at any material time. The justices' summons, issued on the wife's complaint, was served on the husband in Scotland under the Summary Jurisdiction (Process) Act, 1881. The husband was represented before the justices by a solicitor who objected to their jurisdiction. The solicitor also put to the wife, while cross-examining her, certain questions not limited to the question of jurisdiction.

Held (1.) that since the husband was not shown to have been in England at any material time the justices had no jurisdiction to entertain the wife's complaint, in as much as the principle enunciated by Lord Selborne L.C., in *Berkley v. Thompson* (1884) 10 App. Cas. 45, at p. 49, that there must be a cause of action of which the tribunal could take cognizance and also a defendant subject to its jurisdiction, remained unaffected by the combined operation of s. 1 of the Summary Jurisdiction Act, 1848, s. 4, of the Summary Jurisdiction (Process) Act, 1881, and s. 4 of the Summary Jurisdiction (Married Women) Act, 1895 (1); (2.) that the husband's appearance before the justices by his solicitor did not debar him from challenging their jurisdiction on appeal, since neither that act nor any act of the parties could confer on the justices a jurisdiction which they did not possess.

M'Queen v. M'Queen (1920) 2 Sc. L. T. 405 followed.

Berkley v. Thompson 10 App. Cas. 45 discussed.

Foster v. Usherwood (1877) 3 Ex. D. 1 and *R. v. Shropshire County Court Judge* (1887) 20 Q. B. D. 242 distinguished.

Decision of the Divisional Court [1947] W. N. 119 reversed.

(1) By s. 1 of the Summary Jurisdiction Act, 1848: ". . . .
" where an information shall be
" laid before one or more
" justices that any person
" has committed . . . any offence
" or act within the jurisdiction of
" such justice or justices for which
" he is liable . . . upon a summary
" conviction . . . to be imprisoned
" or fined . . . and also in all cases
" where a complaint shall be made
" to any such justice or justices
" upon which he or they . . . have
" authority . . . to make any
" order for the payment of money
" or otherwise . . . then . . . it
" shall be lawful for such justice or
" justices to issue " a " summons
" directed to such person"

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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APPEAL from the Divisional Court.

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On a complaint by the respondent of desertion by her husband, the appellant, Edmonton justices ordered him to pay her 20s. a week. At the time when the justices summoned the husband to appear before them to answer the wife's complaint of desertion, the wife was living at Tottenham, England, and the husband was living at Huntly, Scotland. There was no evidence that either before or after the issue of the summons he was ever in England. During the marriage the parties lived together in Scotland at his parent's house while the husband was on leave. The Divisional Court found as a fact that for the purpose of the case the husband was shown to be ordinarily resident in Scotland, and that the evidence before the justices showed that the wife was, at the material time at the express wish of the husband, resident in England.

The husband was represented before the justices by a solicitor who submitted that they had no jurisdiction to entertain the complaint. During the hearing the solicitor cross-examined the wife, putting to her questions not referable to the question of jurisdiction. On the husband's appeal against the justices' order, the Divisional Court (1) held that s. 1 of the Summary Jurisdiction Act, 1848, s. 4 of the Summary Jurisdiction (Process) Act, 1881, and s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, together constituted a body of special legislation giving the justices jurisdiction in circumstances such as those in question. It therefore dismissed the appeal.

On the husband's appeal to the Court of Appeal, the further question was also argued whether the husband was debarred by his representation before the justices and participation in those proceedings from challenging their jurisdiction on appeal.

By s. 4 of the Summary Jurisdiction (Process) Act, 1881, "
" any process issued under the
" Summary Jurisdiction Acts may,
" if issued by a court of summary
" jurisdiction in England and
" indorsed by a court of summary
" jurisdiction in Scotland
" be served and executed within
" the jurisdiction of the indorsing
" court in like manner as it may be
" served and executed within the
" jurisdiction of the issuing
" court "

By s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, " Any married woman whose
" husband . . . shall have deserted
" her . . . may apply to any court
" of summary jurisdiction acting
" within the . . . district
" in which the cause of complaint
" shall have wholly or partially
" arisen, for an order or orders
" under this Act "

(1) [1947] W. N. 119.

Montagu K.C. and *James MacMillan* for the husband. If the Divisional Court's decision is right, s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, confers on justices not merely jurisdiction in England, but an international jurisdiction over any defendant wherever he may be found. The Divisional Court regarded the justices' jurisdiction in this matter as derived in part from the Summary Jurisdiction (Process) Act, 1881. That Act, however, is purely procedural. Process, to be validly served in Scotland, must first be good process in itself: see *Berkley v. Thompson* (1). Everything said by Lord Selborne L.C., there about s. 4 of the Act of 1881 in relation to bastardy matters applies equally to the justices' married-women jurisdiction. Section 4 of the Act of 1895 gives no wider a jurisdiction to justices than they have under the Bastardy Acts. Section 4 cannot be read as giving justices jurisdiction to fetch anyone into their court from outside the jurisdiction. Its wording cannot be read as bringing Scotland into the justices' jurisdiction, specially in view of the wording of s. 2. The principle actor sequitur forum rei governs the case. Were it otherwise, an Italian woman in England could sue there for maintenance her Italian husband domiciled in Italy. If a husband drives his wife away from home in England at place A. and she goes to place B., she can proceed against him at A. or B. The choice of courts so given to her does not, however, extend beyond the jurisdiction. If Scotland were to be held included, it would mean that an international jurisdiction had been given to the justices by the statute.

[TUCKER L.J. The international jurisdiction would be theoretical, in effect, because of the difficulties of effecting service, on which difficulties it would be entirely dependent.]

The difficulties are no less in respect of Scotland, because the courts there will give effect to service as little as would a foreign court, in view of the law as expounded in *Berkley v. Thompson* (1). [*M'Queen v. M'Queen* (2) referred to.] The husband's place of residence or domicile would have been immaterial if the wife had once succeeded in catching him within the jurisdiction: *Carrick v. Hancock* (3); but there is no evidence as to his presence there, and the special provisions for process in Scotland can only apply to a case where the English court had jurisdiction under the substantive law. The purpose of the Act of 1881 is to avoid the necessity of extradition proceedings.

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(1) (1884) 10 App. Cas. 45. (2) (1920) 2 Sc. L. T. 405.

50, 51.

(3) (1895) 12 T. L. R. 59.

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The House of Lords having expressly held in *Berkley v. Thompson* (1) that the procedural Act of 1881 does not afford the English court jurisdiction in a bastardy case, the same, it is submitted, applies here, specially as the Act of 1895 does not apply to Scotland. [Dicey's Conflict of Laws (5th ed., p. 398) referred to.] In the absence of any provision in the substantive law relating to Scotland there is no power in an English court to serve with process a man domiciled in Scotland. The Act of 1895 did not purport to alter the existing law in relation to jurisdiction, or to extend the category of persons over whom the courts of this country assert jurisdiction. It merely defines the rights of persons in cases within the justices' jurisdiction. It is necessary to look to the general law in order to see what persons are amenable to that jurisdiction: *Berkley v. Thompson* (1), and persons domiciled in Scotland are not such persons. In the interests of the comity of nations, English courts have always been reluctant to encroach on the jurisdiction of foreign courts. If a husband took his wife to Scotland, lived with her there for a short time, and then deserted her there, her remedy would be to proceed against him in Scotland under the appropriate Scottish statute.

[BUCKNILL L.J. Suppose that a husband guilty of cruelty to his wife is in Scotland: does she have to wait until his return to obtain a separation order?]

A woman whose husband is in Scotland does not need the protection of a separation order unless he returns and tries to make her live with him again. If he does that she can serve him with proceedings and obtain the protection of the court.

[BUCKNILL L.J. She may be in need of the protection of a separation order in order that he shall not come to her and try to compel her to live with him.]

Rewcastle K.C., *B. Lewis* and *Gavin Simonds* for the wife. Apart from the substantive question of jurisdiction, it is submitted that the husband, having accepted the jurisdiction of the justices, cannot now be heard to challenge it. His proper procedure before the justices was to prove the facts on which he relied in support of the contention that they had no jurisdiction. Then, when the justices overruled the objection, he could have required them to state a case. That is very different from proceeding, as the husband's solicitor did here, to argue the merits of the case after the objection to jurisdiction has been overruled.

(1) 10 App. Cas. 45, 50, 51.

[TUCKER L.J. Why could he not at the end of the proceedings require a case to be stated including the question of jurisdiction?]

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The case should be asked for as soon as the adverse ruling on jurisdiction has been given. After the merits have been argued, it is too late, for appeal on that matter is to the Divisional Court of the Divorce Division under s. 11, of the Act of 1895. If the husband had won on the merits he would have taken advantage of that decision without further regard to jurisdiction. He cannot be free to accept the justices' jurisdiction in order to argue the merits and then to challenge it once he has lost on the merits.

[COHEN L.J. But the course suggested by TUCKER L.J. would be more convenient.]

Yes. The evidence might, in that event, be taken *de bene esse*, but there should be a clear understanding on the point, that course being taken without prejudice to the objection which has been overruled. It is submitted that jurisdiction is not properly objected to by way of case stated.

On the main point, it is submitted that, unlike the Bastardy Acts, the Act of 1895 has nothing which expressly or by necessary implication restricts the operation of s. 4 to persons resident in England. By s. 1, sub-s. 2 (b) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, a wife may apply for an order under s. 4 of the Act of 1895 on the ground that "her husband while suffering "from a venereal disease, and knowing that he was so "suffering, insisted on having sexual intercourse with her." Parliament obviously, in so amending the Act of 1895, meant a man who so conducted himself to be amenable to the jurisdiction of the court. He is amenable to the jurisdiction at the time when he commits an offence of that kind, and it is surely unthinkable that his amenability or otherwise to it should depend on his being an Englishman or a Scot. The wording of s. 4 of the Act of 1895 is plain: any married woman can have the process which it specifies against her husband. When she has made her complaint the justices are right to grant a summons irrespective of whether the husband happens to be a domiciled Scot. Thereupon the Act of 1881 comes into operation, and Scots law is not effective to relieve the husband of his liability. It is conceded that the Act of 1881 is procedural only. The liability to the process which it establishes, however, arises not under any procedural Act but under the plain words

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of s. 4 of the Act of 1895, the husband having committed the offence against his wife in the area over which the court has jurisdiction. The Bastardy Acts make it clear that the putative father must be within the jurisdiction for process to be served on him. The wording of s. 4 of the Act of 1895 is very wide, and so plain that there is no need to impute any such limitation into it. It is, surely, inconceivable that Parliament intended that, when a husband had committed one of these serious offences against his wife, and she was in the place in which it was wholly or partially committed, she could not get an order against him if he were domiciled or resident in Scotland because in that event outside the jurisdiction.

[TUCKER L.J. The argument for the husband involves that, though a husband may have committed an offence against his wife which, in the case of assault, is a criminal offence, if he is not resident in England he cannot be caught unless the wife finds him there, whereas criminal procedure pre-supposes that where a criminal offence is committed in this country its courts have jurisdiction. It is merely a question of procedure, and, when a warrant for the man's arrest is applied for, the only question is where he committed the offence.]

He may then be found to be where he can be reached or in some country which has a reciprocal arrangement with this country. The issue of the warrant is valid because the court has jurisdiction. There is no reliance on a procedural power only. Similarly here, Lord Selborne L.C.'s principal has no application, for the wife does not rely primarily on the procedural provisions of the Summary Jurisdiction (Process) Act, 1881, but primarily on the jurisdiction which s. 4 of the Act of 1895 confers, and only then on the procedural Act.

Montagu K.C. replying on the question of the husband's right to challenge the jurisdiction of the justices. This is not a case where a defendant has appeared in proceedings. The husband has, by his solicitor, answered a summons. It is doubtful whether technically he has appeared at all. He cannot be said to have appeared voluntarily. If he failed to appear, an order would, he knew, be made against him, whereupon, if ever he crossed into England, he could at once be apprehended. Can it be said that because this husband appeared to defend himself against the inevitable result of a warrant's being issued he was voluntarily accepting the jurisdiction of the court? He appeared only in defence of his personal liberty, not in defence of assets, for example. According to the general law of England,

this husband was not within the jurisdiction of the justices at Edmonton. He has clearly not put himself outside that general law by voluntarily submitting himself to their jurisdiction. Another course open to him would have been to proceed in due course by way of certiorari. Apart from that, his only course would have been to appear before the justices under protest, get the facts as to jurisdiction before them, and then appeal to the Divisional Court by case stated.

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Cur. adv. vult.

Nov. 10. The following judgments were read.

TUCKER L.J. I have had the advantage of reading the judgment which Bucknill L.J. is about to deliver on the main question in this appeal, namely, the jurisdiction of the justices to make an order against the husband under the Summary Jurisdiction (Married Women) Act, 1895, on the ground of desertion, he having at all material times been resident and domiciled in Scotland and having been served with the summons in Scotland and not having been personally present within the jurisdiction when the summons was issued or when the order was made. I entirely agree with the conclusion which he has reached and the reasoning whereby he has arrived at that conclusion, and do not desire to add anything to his judgment on this point. I will content myself, therefore, with discussing two subsidiary matters.

Mr. Rewcastle, for the wife, before addressing himself to the main issue, submitted that the question of jurisdiction did not really arise, and that, accordingly, even if he were wrong on jurisdiction, the judgment of the Divisional Court should be upheld on other grounds. First, he contended that, on the evidence before the justices, there was nothing to show that the husband was resident or domiciled in Scotland. I think that that submission clearly fails. The evidence showed a marriage in Scotland, that the husband's parents, with whom the parties lived after their marriage during their periods of leave from the forces, had their home in Scotland, and that on the occasion of their last leave the husband was seeing his old employers with reference to his employment, which I understand to mean with reference to his returning to his old employment on demobilization. On the summons his address is given as 13, Torry Road, Huntly, in the county of Aberdeen, and he was in fact served in Scotland. There was no evidence that he

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had ever resided in England, and the only inference that could properly be drawn from the evidence is that he was at all times domiciled and resident in Scotland.

Secondly, it was contended that, even if the husband was in fact domiciled and resident in Scotland, he had submitted to the jurisdiction of the justices by reason of the fact that his solicitor had appeared before the justices and cross-examined the wife, and that, accordingly, he could not now be heard to complain of lack of jurisdiction. For this proposition Mr. Rewcastle relied upon the well known authorities which have decided that the courts of this country will enforce the judgments of foreign courts of competent jurisdiction where the defendant was at the commencement of the action resident in a foreign country, or where at the time of judgment he is a subject of the sovereign of that country, or where he has by voluntarily appearing in the action submitted to the jurisdiction of its courts: see *Harris v. Taylor* (1). In that and other similar cases the court has had to consider on the facts of each case whether the defendant had voluntarily submitted to the jurisdiction of a competent foreign court.

Such cases have no application to courts of inferior jurisdiction in this country which derive their jurisdiction from statute. If such an inferior court lacks jurisdiction parties cannot, by agreement or otherwise, confer jurisdiction upon it. An instance of this principle is to be found in *Foster v. Usherwood* (2), where, discussing the jurisdiction of the county court, Bramwell L.J., said: "It is urged that consent has waived the objection. I do not understand what is meant by waiving the objection. In this case the registrar had no jurisdiction to make the order to try the action in a county court. The parties cannot by consent confer a jurisdiction which does not exist." Again, in *R. v. Shropshire County Court Judge* (3) a writ of prohibition was granted against a county court judge who had acted without jurisdiction in awarding compensation to a plaintiff against a bailiff of another county court who had been guilty of neglect, connivance or omission in levying an execution, notwithstanding that the bailiff had appeared before the county court judge and had thereby, as was contended, submitted to the jurisdiction. It is true that in some circumstances the court may refuse to allow prohibition to issue where the applicant has by his conduct waived or acquiesced in some

(1) [1915] 2 K. B. 580.

(3) (1887) 20 Q. B. D. 242.

(2) (1877) 3 Ex. D. 1, 3.

irregularity of procedure or has not taken objection at the proper time, but the reason for this is that the issue of a writ of prohibition is discretionary and that the court may refuse this relief, not on the ground that the applicant has by his conduct conferred on an inferior tribunal jurisdiction which it does not possess, but in the exercise of its discretion in the grant of this particular remedy.

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We are not here concerned with prohibition. Appeal lies to a Divisional Court of the Probate, Divorce and Admiralty Division from a decision of justices under the Summary Jurisdiction (Married Women) Act, 1895, and in my view a respondent to an application under that Act over whom justices have no jurisdiction is not precluded from appealing on the ground of lack of jurisdiction from an order made against him by reason of the fact that he has been represented by a solicitor who, as in the present case, while protesting against the jurisdiction at every stage, has asked some questions of the applicant which do not appear to be exclusively relevant to the question of jurisdiction. In my view this point, which was not taken in the court below, fails.

For these reasons and for those contained in the judgment of Bucknill L.J., I am of opinion that this appeal should be allowed.

BUCKNILL L.J. [after stating the facts :] The only point taken on behalf of the husband before the Divisional Court, and the main point argued before this court, was that the residence in England of the husband as well as of the wife was a condition precedent to the exercise by the justices of their jurisdiction.

There is no reported case decided in England precisely in point, and the decision seems to me to turn on the question whether s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, must be qualified by the general principle stated by Lord Selborne L.C., in *Berkley v. Thompson* (1).

The summons is based on s. 4 of the Act of 1895, and s. 2 of the Act states that the Act shall not extend to Scotland or Ireland. For the purposes of the present case the material words of s. 4 of the Act of 1895 are that any married woman whose husband shall have deserted her may apply to any court of summary jurisdiction acting within the petty sessional district in which the cause of complaint shall have wholly or partially arisen for an order or orders under the Act.

(1) 10 App. Cas. 45, 49.

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In *Berkley v. Thompson* (1) the material facts were that a woman who resided in Sunderland applied to the justices at Sunderland for an affiliation summons in respect of her child, of whom she alleged one Duncan to be the father. At the hearing of the summons before the justices Duncan did not appear, but his solicitor objected that the justices had no jurisdiction on the ground that he was domiciled and resident in Scotland. The justices declined to adjudicate, and a rule was obtained calling on them to show cause why they should not proceed to hear and determine the matter. The Queen's Bench Division after argument discharged the rule, and this order was affirmed in the Court of Appeal and then in the House of Lords.

The principle stated by Lord Selborne L.C. in *Berkley v. Thompson* (2) was as follows: "The general principle of law is, 'Actor sequitur forum Rei'; not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that tribunal; and a person resident abroad, still more, ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction, is *prima facie* not subject to the process of a foreign court—he must be found within the jurisdiction to be bound by it." The general principle finds its place in Dicey's Conflict of Laws, (5th ed., p. 398), where r. 5 states: "In an action in personam in respect of any cause of action, the courts of a foreign country have jurisdiction in the following cases. First case—where at the time of the commencement of the action, the defendant was resident or present in such country so as to have the benefit and be under the protection of the laws thereof." It is further stated (at p. 403) that "Presence is enough or in other words, residence means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ or other process by which the action is commenced." The authority for this statement is *Carrick v. Hancock* (3). In that case Lord Russell of Killowen C.J., observed that the jurisdiction of a court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the jurisdiction of its courts. In his opinion that duty was "correlative to the protection given by a state to any person

(1) 10 App. Cas. 45.

(3) 12 T. L. R. 52, 60.

(2) *Ibid.* 49.

" within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time the person was actually in the territory was wholly immaterial." In that case the writ was served upon the defendant during a short visit which he was paying to Sweden. This passage in Lord Russell's judgment was cited with approval by Bankes L.J. in *Harris v. Taylor* (1).

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Is there any reason why the general principle stated by Lord Selborne should not be applied when interpreting s. 4 of the Summary Jurisdiction Act (Married Women), 1895? The President in his judgment, as I understand it, said that in his view the combined effects of s. 1 of the Summary Jurisdiction Act, 1848, s. 4 of the Act of 1895 and s. 4 of the Summary Jurisdiction (Process) Act, 1881, comprised "special legislation" which brought the husband, although resident in Scotland, within the jurisdiction. With the greatest respect to the President, I do not agree that the Acts in question have this result. It is true that s. 1 of the Summary Jurisdiction Act, 1848, is quite general in its terms, but I do not think that this fact takes it out of the general principle to which I have referred. Lord Watson in *Berkley v. Thompson* (2) pointed out that the Summary Jurisdiction Acts before 1881 gave no jurisdiction as against the respondent when domiciled and resident in Scotland. Section 4 of the Act of 1881 is procedural only, and as Lord Selborne L.C. pointed out (3), that section proceeds upon the assumption of jurisdiction under the Summary Jurisdiction Acts. Lord Selborne said (3): "How can the process be issued under the Summary Jurisdiction Acts if the Summary Jurisdiction Acts give no power to issue such process? This point is not peculiar to bastardy cases; the argument goes to the extent, that any process whatever which a court of summary jurisdiction can be induced to issue, though in a case manifestly altogether beyond its jurisdiction, and as to which the Summary Jurisdiction Acts give it no jurisdiction, is nevertheless to be served and executed in the manner provided for in Scotland. To me the natural meaning of the words, 'process issued under the Summary Jurisdiction Acts,' is process issued under the jurisdiction given by those Acts, and in the manner which those Acts authorize and require. It is begging the whole question to say that those Acts give jurisdiction to issue a summons in this case."

(1) [1915] 2 K. B. 580, 592.

(3) Ibid. 50, 51.

(2) 10 App. Cas. 45, 56.

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Bucknill L. J.

The question whether the general words of s. 4 of the Act of 1895 constitute special legislation and an exception to the general principle is the question which has to be decided in this case. I doubt whether, in a case like the present, it is necessary to prove that the husband was ordinarily resident in the jurisdiction at the time when the summons was issued, and am disposed to think that mere presence therein is sufficient ; but it is unnecessary to decide the point because in this case not only was the husband ordinarily resident in Scotland, but there is no evidence that he was ever in England.

Although there is no reported English case in point, there is a case decided in Scotland directly in point. This is *M'Queen v. M'Queen* (1), decided by the Lord Ordinary, Lord Ashmore. The complainer was a domiciled Scotsman residing in Scotland until, on the outbreak of war, he joined His Majesty's Forces. In 1915 he met the respondent, then a domiciled Englishwoman, in London, and married her there. On his discharge from the army in February, 1920, the spouses did not live together. The husband alleged that the wife refused to live with him in Scotland, and the wife alleged that her husband deserted her in England and refused to provide for her support. The wife then took out a summons against her husband at the West Ham police court on the ground of her husband's desertion under the Summary Jurisdiction (Married Women) Act, 1895, and the magistrate issued a summons calling on the husband to appear at the police court to answer the complaint. The summons, having been duly endorsed by a justice of the peace for Kirkcudbrightshire, was served at the husband's most usual place of address in Maxwelltown. The husband did not appear at the police court, and the magistrate made an order against him for maintenance. This order was served at the same house as the summons was served. As the husband paid nothing under the order, the wife obtained a warrant for his arrest from the English justices. The warrant, after being endorsed in Scotland as before, was executed by the arrest of the husband in Scotland with a view to his being taken to the police court at West Ham. The husband then presented a note of suspension and liberation before the Court of Session on the ground that he had been wrongfully charged at his wife's instance to pay a sum of money for maintenance in virtue of a judgment of an English court of summary jurisdiction. The wife appeared before the court and pleaded that the order was a valid warrant

(1) (1920) 2 Sc. L. T. 405.

for her husband's arrest and that his note of suspension and liberation should be refused. Lord Ashmore decided in the husband's favour on the ground that the case was covered by the rule laid down in *Berkley v. Thompson* (1) which is set out above.

Lord Ashmore, in the course of his judgment, said: "The Lord Chancellor's opinion seems to me to be applicable to the present case and to be conclusively adverse to the regularity of the procedure which has culminated in the apprehension of the complainer under the arrest issued by the court of summary jurisdiction in England. Under the reasoning to which effect was given in the House of Lords case the whole substratum of the jurisdiction asserted by the English court in this case necessarily collapses. There being no initial jurisdiction over the complainer, the English court had no power to cite him to that court; and, on that assumption, the subsequent procedure, including both the granting of the order to pay aliment and the warrant to apprehend—all this is inept." The decision was confirmed on appeal by the Second Division of the Inner House on July 14, 1921, but there is no published report of the reasons for the decision: see 85 J. P. Jo. 335. In my opinion, *M'Queen v. M'Queen* (2) was rightly decided, and the same decision should be given in this case.

I agree with the judgment of Tucker L.J., that the objection to the jurisdiction was not waived by the presence of the husband's solicitor at the police court in order to object to the jurisdiction.

COHEN L.J. I have had the advantage of reading the judgments which have been delivered by my brethren, and I agree so entirely with the reasons which they have given for allowing this appeal that I do not desire to add any reasons of my own.

Appeal allowed.

Solicitors for the husband: *H. H. Wells & Sons, for Andrew Duncan, Huntly, Aberdeenshire.*

Solicitors for the wife: *Alfred Slater & Co.*

(1) 10 App. Cas. 45, 49.

(2) (1920) 2 Sc. L. T. 405.

C. A.

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v.
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Bucknill L.J.

Reversed. C.A. [1948] 2 All E.R. 908.

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Jan. 14, 21.

Pilcher J.

In re THE ESTATE OF WINGHAM, DECEASED.

Probate — Wills — Privileged wills — Wills Act, 1837 (7 Will 4 & 1 Vict. c. 26), s. 11—Deceased training for operational flying duties—Document signed in Canada during such training—Deceased not “in expeditione.”

Not every soldier in time of war, even though technically on active service, is entitled to make a privileged will; and the fact that a soldier is *inops consilii* is not to be regarded in itself as a test of his right to make such a will.

In interpreting the words “in actual military service” the courts have considered whether, paying due regard to the changed conditions of modern warfare, the particular soldier can at the time he made the testamentary document be considered as having been so circumstanced that he would, under the Roman law, have been regarded as “in expeditione.”

Service personnel “in expeditione” are confined to those who (1.) are actually engaged upon a campaign; (2.) are proceeding or under orders to proceed or to hold themselves in readiness to proceed upon a campaign; (3.) are situated in what can properly be called a beleaguered fortress or a war base from which active offensive or defensive operations are being conducted.

A member of the Royal Air Force executed a testamentary document in Canada while training for operational duties, and subsequently died as a result of injuries received in an aircraft accident in that country.

Held, that a member of the Forces sent under orders to a place far removed from the fighting zones in order that he might pursue his training without hostile interference is not “in actual military service” within the meaning of the Act, for the whole world cannot be regarded as having been a theatre of war during the events of 1939 to 1945.

PROBATE MOTION.

The deceased, Pilot Officer Roy Wingham, entered the Royal Air Force in February, 1940. In October, 1942, he was sent to Canada for training in operational duties. On March 1, 1943, whilst stationed at North Battleford, Saskatchewan, he executed the testamentary document in question in these proceedings. This document did not comply with the Wills Act, 1837. On August 11, 1943, the deceased met his death as a result of an accident which occurred whilst he was flying on duty in Canada in the course of his training for operational duties. The testamentary document executed in March, 1943 was valid as a privileged will providing that the deceased was “in actual military service” at that time.

Harvey Moore for the applicant. The test as to whether a man is "in actual military service" for the purposes of the Wills Act, 1837, is whether the testator has "taken some step" towards joining the forces in the field. The step may be a "very small one"—*In the Goods of Hiscock* (1). It may even be the receipt of an order for mobilization—*Gattward v. Knee* (2). A liberal interpretation is to be given—Hill J. in *In the Estate of Grey* (3), where grant was refused because testator was "neither in the field, nor proceeding to or from the field, nor in any place for the purpose of proceeding to or from the field." (4)

The origin of the privilege to persons "in actual military service" was the Roman law conception of being "in expeditione," and therefore in circumstances of being "inops consilii." It matters not whether the individual personally was or was not "inops" consilii in fact, but whether the conditions of his service afforded "consilium" or not. Here were conditions which made the deceased "inops consilii" and therefore "in expeditione."

Conditions of modern war have extended the character of "the field of battle." The field is the world. The testator ran the risks of enemy attack in the Atlantic, and might at any time have been called upon to fly against the Japanese. The test is not, was the testator in danger? but had he "taken a step" committing him to the likelihood, if so directed, of danger and lack of counsel in the field?

[Many of the cases to be found in the judgment were also referred to in argument.]

The motion was contested by the father of the deceased, appearing in person.

Cur. adv. vult.

Jan. 21. PILCHER J. read the following judgment. In this case the applicants who stand to benefit under a testamentary document signed by the deceased on March 1, 1943, ask for a grant of letters of administration with the testamentary document annexed. The defendant is the father of the deceased. At the hearing he appeared in person as he could not bear the expense of instructing solicitors and counsel. The defendant gave evidence explaining to me why he was contesting the case. All I need say with regard to him

(1) [1901] P. 78.

(3) [1922] P. 140.

(2) [1902] P. 99.

(4) Ibid. 143.

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is that he appears to have acted throughout with great good sense and good feeling and I am satisfied that his case has not been prejudiced by the fact that he was not legally represented.

The testamentary document which the deceased executed on March 1, 1943, was valid as a privileged will provided (and this is the point which I have to determine) that at the time when he executed the document the deceased was "in actual military service" within the meaning of the words in s. 11 of the Wills Act, 1837, so as to entitle him to make a privileged will. Section 5, sub-s. 2 of the Wills (Soldiers and Sailors) Act, 1918, provides that for the purposes of s. 11 of the Wills Act, 1837, the expression "soldier" includes a member of the Royal Air Force.

The development and scope of modern warfare as exemplified by the conditions which prevailed in the recent world war have rendered the consideration of the circumstances in which a member of the armed forces of the Crown is entitled to make a privileged will one of considerable difficulty. The decisions in the recent cases of *In the Estate of J. King Spark* (1) and *In the Estate of Gibson* (2) are not easy to reconcile and I may therefore be forgiven for making a short review of some of the authorities dealing with the point under consideration.

Section 11 of the Wills Act, 1837, provides that "any soldier being in actual military service" may dispose of his personal estate without the formalities required by the Act. The material words in this section are the same as those in s. 23 of the Statute of Frauds.

The courts of this country have from time to time experienced considerable difficulty in construing these words owing to the fact that conditions of military service and of warfare generally have changed completely since the words in question found their way into the statute book. It is now generally accepted that the words in question, when first inserted into the Statute of Frauds, were intended to confer upon British soldiers the same testamentary rights as had been enjoyed by Roman soldiers under Roman law. The first authority to which I need refer is the well-known case of *Drummond v. Parish* (3). In that case Sir Herbert Jenner Fust reviewed at considerable length the provisions of the Roman law as expounded by subsequent commentators. At p. 536 he says: "It is quite clear from these passages from the Digest, the Code and the com-

(1) [1941] P. 115.

(2) [1941] P. 118 n.

(3) (1843) 3 Curt. 522.

"mentators generally, that the privilege did not extend to soldiers of every description, they must be soldiers expeditionibus occupati, or called out to defend the city; this last case was of itself an exception, for it could not strictly be said to be 'expeditio'." At p. 537 he refers to a passage in Swinburne on Wills, 6th ed. (1743). Dealing with milites armati Swinburne says: "Concerning the first, they be such as lie safely in some castle, or place of defence, or besieged by the enemy, only in readiness to be employed in case of invasion or rebellion, and then they do not enjoy these military privileges, or else they be such as are in expedition or actual service of wars, and such are privileged, at least during the time of their expedition" At the end of his judgment Sir Herbert Jenner Fust says (1): "Being of opinion, from the result of the investigation of the authorities, that the principle of the exemption, contained in the eleventh section of the Act, was adopted from the Roman law, I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words actual military service, the privilege as respects the British soldier, is confined to those who are on an expedition."

In *In the Goods of Major-General Clement Hill, decd.* (2) decided two years after *Drummond v. Parish* (3), Sir Herbert Jenner Fust refused to grant probate of an unattested testamentary document made by General Hill, who was at the time that he executed it (May, 1843) in command of the Mysore Division stationed at Bangalore. As is well known, Her Majesty's troops were at this time engaged in active warfare in India and it appears that the testator might at any time have been called to march against the enemy. In spite of this fact Sir Herbert Jenner Fust rejected the motion and refused to admit the unattested testamentary document, presumably because General Hill could not on the facts of the case be said to have been in expeditione when he executed the document.

No further guidance is to be obtained from reported cases as to the proper construction to be given to the words "in actual military service" until we come to the cases dealing with soldier's wills executed during the South African war. In *In the Goods of Hiscock* (4) Sir Francis Jeune P. pronounced in favour of a testamentary document executed by a private in a volunteer battalion. At the time of the execution of the

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(1) 3 Curt. 522, 542.

(3) 3 Curt. 522.

(2) (1845) 1 Rob. Ecc. 276.

(4) [1901] P. 78.

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document, the testator, having sent in his name for active service, had proceeded under orders into barracks at Chichester. He later embarked for South Africa where he received a wound from which he died. The case of *In the Goods of Hiscock* (1) is important because Sir Francis Jeune P., after discussing Sir Herbert Jenner Fust's decision in *Drummond v. Parish* (2), seems to have paid little if any regards to the words of the Wills Act "in actual military service," and to have applied his mind solely to the meaning to be given under modern conditions to the words "in expeditione." He says (3): "When a Roman soldier did anything towards fighting the enemy, he would have been considered, under the law of his time, as being 'in expeditione'." Then he continues (4): "In case of invasion or civil war—both circumstances which were more present to the minds of the persons who framed the laws of this country in the time of Charles II than they are to the legislators of our own time—this step might be merely that a man was taken from his home to man the walls or defences of his own native town. In the case of invasion, I should imagine, for instance, that a man living at Dover, and who was called upon to go into the fortifications at Dover and to assist in the defence, would have been within the meaning of the term 'in expeditione' or 'actual military service,' although the movement made or step taken by him would be small in point both of time and locality or distance." In the result Sir Francis Jeune held that the step taken by the testator in *In the Goods of Hiscock* (1), namely, proceeding into barracks with a view to embarking for South Africa, was sufficient and he accordingly pronounced in favour of the testamentary document.

In the following year Sir Francis Jeune P. took the matter a little further in *Gattward v. Knee* (5). In that case the deceased's battalion, stationed in India, was warned for service and two days later was "ordered to mobilize" for service in South Africa. The battalion was embarked on September 19, 1899. Between September 8 and September 19, 1899, the deceased wrote an undated letter which was propounded as a soldier's will. In the course of his judgment Sir Francis Jeune P. says (6): "I have no doubt myself that mobilization, giving to that word the effect which I understand it to carry,

(1) [1901] P. 78.

(2) 3 Curt. 522.

(3) [1901] P. 78, 82.

(4) Ibid. 83.

(5) [1902] P. 99.

(6) Ibid. 102.

" may be fairly taken as a commencement of that which in
 " Roman law was expressed by the words 'in expeditione'.
 " These words meant something more than the English words
 " 'on an expedition,' because it is quite clear that when a
 " force begins in a sense to engage in or to enter upon active
 " service, it would be said to be in expeditione. I thought, when
 " deciding the case cited (*In the Goods of Hiscock* (1)), and I still
 " think, that it is a fair test to ask whether or not the person
 " whose testamentary dispositions are in question has done
 " anything; but I am of opinion that if the order for mobili-
 " zation has been received, although the man himself may
 " have done nothing under it, yet that order so alters
 " his position as practically to place him in expeditione.
 " Such an order goes beyond a mere warning. I do not think
 " a mere warning for active service would be sufficient."

It would seem therefore that up to the time of the South African war the courts of this country when called upon to decide whether a soldier was "in actual military service" have considered only whether such soldier would have been regarded under the Roman law as being "in expeditione." The decisions in *In the Goods of Hiscock* (1) and *Gattward v. Knee* (2) moreover make it clear that in more modern times a soldier who in time of war takes any personal step to join the forces in the field or whose unit is ordered to mobilize for service in the field is in expeditione and thus entitled to make a privileged will.

The cases dealing with testamentary documents executed by soldiers during the war from 1914 to 1918 do not take the matter much further. In *In re Stable, decd.: Dalrymple v. Campbell* (3), where another point was under consideration, it seems to have been accepted by both parties that a nuncupatory will made by an officer-cadet at Sandhurst after he had received orders to proceed to France was good. In *In the Estate of Grey* (4) Hill J. says (5): "Ever since the judgment in *Drummond v. Parish* (6) it has been settled that the Act does not apply to every soldier, but only to a soldier who is 'on an expedition.' Where that relation begins and where it ends must be decided by the circumstances of the particular soldier. As to the point at which a soldier begins to be on an expedition, in *The Goods of Hiscock* (1) shows that a liberal interpretation must be given."

(1) [1901] P. 78.

(2) [1902] P. 99.

(3) [1919] P. 7.

(4) [1922] P. 140.

(5) *Ibid.* 142.

(6) 3 Curt. 522.

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In the result Hill J. decided that the unattested will in question, which was executed in hospital in London on May 9, 1921, could not be admitted to probate as a soldier's will although the official termination of the war did not come until August 31, 1921. At the conclusion of his judgment Hill J. says (1): "(1.) for a soldier to be in actual military service it is not sufficient that there should be a state of war; he must be in 'some place for the purposes of the war; and (2.) 'Actual 'military service' refers to a state of fact, not to a date 'artificially fixed by Act of Parliament or Order in Council.'" *In re Kitchin* (2) was another case decided during the 1914/18 war, in which it was held that a soldier who had been ordered to hold himself in readiness for service overseas could make a privileged will.

It is not necessary, I think, to refer to any other case until we come to the cases decided during the recent war. The first reported case in this series of cases is a decision of Henn Collins J. in *In the Estate of Gibson* (3). In that case Henn Collins J. decided that the testator, who was at the time he executed his will a Lt.-Col. in the Army Dental Corps attached to a district command headquarters, was not "in actual 'military service.'" The report does not state where the testator was at the time when he executed the document, but it appears that he lived at his home which was situated some miles from the district command headquarters. In that case Henn Collins J. is reported to have said (3): "he could understand 'the privilege granted by s. 11 of the Wills Act, 1837, being 'extended to a soldier in England who had been mobilized 'for service abroad or ordered to go to a certain place for 'embarkation, but a man who was carrying out professional, 'peace-time duties, although he was under military authority, 'was no more a fighting soldier because he was in the army 'than an ordinary civilian, who, in the circumstances of the 'present war, might be said to be in the front rank of the 'fighting.'"

Six months later the case of *In the Estate of J. King Spark* (4) came before Hodson J. who decided that a soldier serving in the army in camp in England during the war was "in actual 'military service.'" After referring to *In the Goods of Hiscock* (5) and cases decided during the Boer war and the

(1) [1922] P. 140, 143.

(2) (1919) 35 T. L. R. 612.

(3) [1941] P. 118 n.

(4) [1941] P. 115.

(5) [1901] P. 78.

1914/18 war Hodson J. said (1): "It is, however, quite clear that in the present war the extent of military operations has been very much enlarged, in depth and in height, and that circumstances are different now from those which existed in earlier wars. The scope of military operations is very much larger, and it seems to me that a soldier who is in camp (even though he is in England and not under orders to proceed overseas) is thereby a mark for enemy action and is in a position in which he is 'in actual military service' within the meaning of the section just as if he were engaged with the enemy in such circumstances as, no doubt, were envisaged by those responsible for the drafting of the Wills Act, 1837."

In *In the Estate of Rippon* (2) I decided that the testator was "in actual military service." The circumstances were that, being an artillery officer in the territorial army, he executed a testamentary document on August 25, 1939, a few hours after he had been ordered to re-join his battery in Kent. There was evidence that his services with his battery were "urgently required for ensuring preparedness for the defence of the realm against external danger." On the other hand, no state of war existed on August 25, 1939, and the territorial army was not embodied until September 1, nor mobilized until September 2, 1939.

In *In the Goods of Rowson* (3) Wallington J. decided that a member of the Women's Auxiliary Air Force was "in actual military service." The report of that case is silent as to the precise duties which the testatrix was performing at the time when she executed the document, but it appears that she had during the course of the war been attached to Balloon Command and Bomber Command, and had from time to time been in charge of several stations where members of the Women's Auxiliary Air Force were on duty. In that case Wallington J. found that having regard to these activities the lady in question was at the material time "in actual military service."

In *In the Estate of Anderson* (4) the learned President decided that the deceased, who was a musketry instructor to a platoon in the Home Guard, was not at the time when he visited his solicitors as a civilian and gave instructions for the making of a will "in actual military service."

I ought to add that I was informed by counsel that Barnard J.

(1) [1941] P. 117.

(2) [1943] P. 61.

(3) [1944] 171 L. T. 70.

(4) [1944] P. 1.

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had recently pronounced in favour of a privileged will made by a member of the Royal Air Force whilst undergoing training in Canada. The case was uncontested and the learned judge did not deliver a formal judgment. In the circumstances whilst bearing in mind the fact that Barnard J. decided as he did I should not feel bound to follow his decision if, after hearing argument, I came to a contrary conclusion myself.

A careful study of the cases to which I have referred seems to establish the following general propositions: (1.) Not every soldier in time of war, even though technically on active service is entitled to make a privileged will. (2.) Whilst one of the main reasons under both the Roman law and our law for conferring upon a soldier the right in certain circumstances to make a privileged will was that such a soldier was more often than not "*inops consilii*" the circumstance that a particular soldier was or was not at the material time "*inops consilii*" is not to be regarded as a test of his right to make a privileged will. (3.) The words "*in actual military service*" which first appeared in the Statute of Frauds are not to be construed too literally. In considering whether a soldier was "*in actual military service*" so as to entitle him to make a privileged will the courts have paid little heed to the literal meaning of the words "*actual military service*" but have considered whether, paying due regard to the changed conditions of modern warfare, the particular soldier can at the time he made the testamentary document be considered as having been so circumstanced that he would under the Roman law have been regarded as "*in expeditione*." The material words are to be given a literal interpretation. (4.) A soldier who in time of war in pursuance of orders has made a move however slight to proceed upon a campaign, or who, without having made any such move, has received orders to proceed or to hold himself ready to proceed upon a campaign is within the privilege.

It is clear that under the Roman law soldiers engaged in defending a beleaguered fortress or city as well as those engaged in active offensive operations were entitled to make a privileged will.

For the first time for over a hundred years this country was during the recent war under serious threat of invasion for a prolonged period. Throughout almost the whole war she was subjected to damaging attacks from the air. Towards the end of the war she was bombarded by long range rocket guns.

Owing to the nature of the attacks to which she was subjected not every arm of the fighting services was immediately or continuously engaged in defensive measures but all serving personnel were available to render indirect assistance when required. All service personnel, as well as the civil population, were in peril in varying degrees. The whole national resources were harnessed with a view to resisting invasion and preparing an expeditionary counter attack when the time was ripe.

There would seem, upon these facts, to be some justification for regarding this country during most of the period of the recent hostilities as a beleaguered fortress. From the passage in Swinburne quoted by Sir Herbert Jenner Fust in *Drummond v. Parish* (1) it would seem that under the Roman law not every soldier who formed part of a garrison of a beleaguered city was entitled to make a privileged will. The privilege appears to have been confined to those who were actually engaged in defensive operations presumably because in those days the range of weapons was so limited that only soldiers actually engaged with the enemy were in any physical danger from hostile attack. It was clearly upon this ground, namely that the camp in which the soldier was stationed was "a mark for enemy action" that Hodson J. decided in favour of the privilege in *In the Estate of J. King Spark* (2). The same considerations may well have moved Wallington J. to pronounce in favour of the privileged will of the member of the Women's Auxiliary Air Force in *In the Goods of Rowson* (3). In *In the Estate of Gibson* (4) the testator was killed by a bomb in his own private house. Neither the facts of this case nor Henn Collins J.'s judgment are very fully reported but the learned judge appears to have decided against the privilege in this case because the testator, although a commissioned officer, was not a fighting soldier. It is well established that in the consideration of whether privilege exists the material time is the time when the will was made and presumably, if locality is important, it is the locality in which the will is made and not the locality where the deceased meets his death which is important. In neither *In the Estate of Gibson* (4) nor *In the Goods of Rowson* (3) does the report make any mention of when or where the material testamentary document was made. If the deceased in *In the Estate of Gibson* (4) had happened to make his will at the district command headquarters to which he was attached it would have been difficult to argue that such

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(1) 3 Curt. 522, 537.

(2) [1941] P. 115.

(3) 171 L. T. 70.

(4) [1941] P. 118 n.

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headquarters was not a favourable mark for enemy bombs. Whilst there may have been additional facts not contained in the report in *In the Estate of Gibson* (1) which fully justified the learned judge in arriving at the conclusion which he did I permit myself to doubt whether, having regard to the circumstances which prevailed in this country during the recent war, the fact that a soldier was or was not in what may conveniently be called a fighting unit has any really material bearing upon his right to make a privileged will.

To attempt to construe words which are no longer applicable to modern conditions is a difficult and thankless task. In my humble view the logical construction of the words "in expedition" when applied to the conditions of the recent war would be to regard the whole of this country as a beleaguered fortress or a war base from which an expedition was being prepared in which case the testamentary documents of all service personnel in continuous employment as such would be entitled to privilege. An alternative view would be to admit as privileged wills only those testamentary documents in an area of this country which could properly be said at the material time to be a mark for enemy attack.

I have ventured to make the above general observations although they are not directly relevant to the point which I have to determine in the present case because I think they may perhaps afford some assistance in the facts of the present case.

The deceased commenced his training in the Royal Air Force in this country in 1940. He remained in this country as a member of the Royal Air Force until October, 1942. During this period the whole of this country was subject to enemy air attacks. No doubt the Royal Air Force stations or some of them where the deceased was undergoing training were particular marks for enemy bombs. In October, 1942, he was sent to Canada under the air training scheme. It is perhaps legitimate to infer that amongst the reasons which moved the authorities to send large numbers of members of the Royal Air Force to Canada to train in operational flying was that such flying could be carried out in Canada without fear of enemy interference. No doubt there were many other reasons. Canada was not the scene of any active hostile operations. It was not in the popular phrase a "theatre of war." The deceased was thus moved by orders of the competent authorities from an area subject to continual enemy

attack to a locality far removed from active hostile operations.

Mr. Harvey Moore who appeared for the plaintiff argued that in the recent hostilities the whole world should be regarded as a theatre of war. He further contended that in proceeding under orders to Canada for further training the deceased had taken a step and a necessary step along the path which was destined ultimately to lead him into active combat with the enemy. He contended, relying on *In the Goods of Hiscock* (1), that after taking this step he was entitled to make a privileged will.

After giving the whole matter the most careful consideration I am unable to accede to these arguments. In my opinion the decided cases to which I have referred show that service personnel in time of war who are in expedition or, to use the words of the Wills Act, 1837, "in actual military service" are confined at least to those who : (1.) Are actually engaged upon a campaign ; (2.) are proceeding or are under orders to proceed or to hold themselves in readiness to proceed upon a campaign ; (3.) are situated in what can properly be called a beleaguered fortress or a war base from which active offensive or defensive operations are being conducted.

I think it would be wrong, even under the conditions which prevailed in the last war to regard the whole world as a theatre of war and wrong to hold that a member of the forces who is sent under orders to a place far removed from the fighting zones in order that he may pursue his training without hostile interference is "in actual military service" so as to entitle him to make a privileged will.

Mr. Harvey Moore contended that the fact that the deceased's training in Canada involved flying risks was a matter which had some bearing upon the issue to be determined. I do not take this view. Flying risks were necessarily incidental to the deceased's training as an operational pilot. The important matter to my mind is that by his removal to Canada the deceased was enabled to pursue his admittedly hazardous training in an area which was not subject to hostile interference or attack.

For the above reasons I think that this motion should be dismissed. The costs of both parties will be paid out of the estate.

Motion dismissed.

Solicitor : Miss C. Morrison.

(1) [1901] P. 78.

J. B. G.

C. A.

HEWITT v. HEWITT.

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Husband and wife—Practice—Petition for restitution of conjugal rights—Right to begin.

Jan. 20.

Tucker,
Cohen and
Wrottesley L.JJ.

In her petition for restitution of conjugal rights a wife pleaded that her husband had withdrawn from cohabitation with her; that he had refused and still refused to return to her and render her conjugal rights; and that she desired him to return to her and was willing to render him conjugal rights. The husband, by his answer, admitted that he had ceased to live with his wife, said that it was she who had left the matrimonial home and not he, and alleged that he had just cause for ceasing to live with her and that she had no sincere desire to resume cohabitation. At the trial of the petition, counsel opened the wife's case without comment from the judge or the other party, though there had been no agreement that he should do so. When the case had been opened, the judge of his own motion intimated that, on the pleadings, the husband should have begun, and ruled that counsel for the husband should forthwith call evidence. Counsel refused to take that course, whereupon the evidence in support of the wife's case was taken. The judge granted the petition. On appeal by the husband,

Held, that, notwithstanding the practice in the Divorce Division whereby, when the pleadings were framed as above indicated, the respondent's counsel was allowed to begin, having regard to the course taken at the trial the wife should have been directed to call evidence in support of her counsel's opening statement, the judge's ruling was erroneous, and, as in the result the petition had not been tried, it must be remitted for a new trial.

Cherry v. Cherry (1858) 1 Sw. & Tr. 319 considered.

APPEAL from Mr. Commissioner Grazebrook.

By her petition, dated December 5, 1945, for restitution of conjugal rights, the present respondent recited the marriage between the parties in July, 1943, the subsequent cohabitation, the absence of children, and the usual formal matters. The petition stated in para. 6: "On or about August 11, 1945, the [husband] withdrew from cohabitation with the [wife] and refused, and has ever since refused, and still refuses, to return to her and to render her conjugal rights." Particulars of that allegation followed, and para. 7 averred: "The [wife] desires that the [husband] shall return to cohabitation with her and is willing to render him conjugal rights."

The husband pleaded in his answer: "1. That he admits that he has ceased to live with the [wife] and says that

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

" by reason of the matters hereinafter set out he had, and still
 " has, just cause for refusing to live with her. 2. Further
 " or alternatively by reason of the said matters the [husband]
 " says that the [wife] had no sincere desire to return to the
 " [husband] and resume cohabitation." Paragraph 3 set
 out facts relied upon as particulars of paras. 1 and 2.

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The husband's answer specifically denied the allegations contained in the particulars in the petition, but admitted that the wife had written the letters which had been referred to in her petition by way of particulars, and that he had not replied to them. He denied that the contents of the letters were truly or accurately set out in the petition, and specifically denied the allegation that the wife desired that he should return to cohabitation with her and that she was willing to render him conjugal rights.

On those pleadings the case came on for trial before Mr. Commissioner Grazebrook on May 20, 1947. Counsel for the wife opened the case without objection from the husband or the court to his doing so. No specific agreement had been come to between the parties about who was entitled to open the case on the pleadings as they stood. The case was opened at considerable length, namely, for over forty minutes, and in great detail, the whole ground being covered, a number of the letters in the agreed bundle of correspondence being read. Comment was made that to numbers of those letters no reply had been received, and a telephone communication was referred to. An elaborate and detailed presentation of the whole of the wife's case was outlined by her counsel. When counsel had reached the end of his opening, the commissioner, of his own motion, took the point that on the pleadings it was for the husband to begin, and that he (the husband) had tacitly acquiesced in the wife petitioner's exercising that right. An adjournment was allowed for a short period in order that the husband's counsel might consider his position, whereupon counsel claimed the right to reserve the calling of his evidence until after the wife had called her evidence pursuant to the facts and matters that her counsel had opened in his opening statement. The commissioner said that he must call his evidence forthwith if he desired to tender evidence. Counsel for the husband having intimated that he did not intend to call evidence in view of that ruling, the wife gave evidence in accordance with the case which had been opened, and it was sought to prove that there

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had been withdrawal of cohabitation by the husband without lawful justification, and to satisfy the court as to the wife's sincerity. The commissioner granted the wife a decree as asked for, and the husband now appealed.

Linton Thorp K.C. and *O'Malley* for the husband. The husband here was not denying the fact of separation simpliciter: he was admitting the separation but saying that it was the wife who had left him and not he who had left her. That makes all the difference, it is submitted, when it comes to deciding who is to begin. By the statement in *Rayden on Divorce* (4th ed., p. 335) that the respondent begins by proving justification if the fact of separation is not denied, the author means by "fact of separation" the question who left whom. That question is in dispute here on the husband's answer. *Burroughs v. Burroughs* (1) covers this case, though, being a decision of the Judge Ordinary, it does not bind this court. The allegations in the pleadings there are the same as in this case. The cases which lay down that it is for the respondent to begin in restitution cases are distinguishable from this case. For example, *Cherry v. Cherry* (2) is distinguishable because on the pleadings there the real issue turned on the wife-respondent's plea that she had left her husband and was justified in refusing to return to him. It was for her to prove that, and, therefore, it was for her to begin. The husband here pleads just cause, it is true, but the effect of his answer is to say that it was his wife who left and not he. Paragraph 7 of the petition places the burden of proof on the wife. The commissioner was wrong, therefore, to rule that the husband ought to have begun. *Smith v. Smith* (3), again, is distinguishable because of the husband's allegation here that the wife left entirely of her free will.

In any event, it is submitted, having regard to the way in which the case had developed coram judice, the wife's counsel was not entitled to the advantage of the commissioner's ruling. He had opened his client's case in full detail. He should have acted on that, and was, as it were, estopped thereby from taking advantage of the commissioner's ruling.

The burden of proof here was not on the husband. In every divorce suit, it is the petitioner who should begin.

G. A. Gardiner for the wife. If after counsel for the one side

(1) (1862) 5 L. T. 771.

(3) [1900] P. 66.

(2) (1858) 1 Sw. & Tr. 319.

has opened his case the court finds that the counsel for the other side ought to have opened, the court should say so. If the admitted facts are that the wife left in the first place, but returned after four days and pleaded repeatedly to be taken back, no court should say that the burden is not on the husband, and that it is not for him to begin. The husband cannot, on such facts, cast the burden of proof on to the wife. It is for this husband to justify his refusal to take his wife back. He does not plead that he never refused to live with his wife, in which case she might have had to begin. His plea is that he has just cause for refusing to live with her, and that is for him to prove. The whole question is whether he had just cause for refusing to live with her merely because she ran back to her mother's home for four days.

[COHEN L.J. What do you say to the point that it is for the wife to prove her sincerity?]

If that is so, then it must be the case in every petition for restitution of constitutional rights.

[COHEN L.J. The burden of proof is distinct from the right to begin. You claimed and exercised the right to begin here.]

Those are matters for the discretion of the trial judge. If one side has opened and the judge then decides that the other side should have opened, has he not a discretion to make that other side forthwith call its evidence?

[WROTTESELEY L.J. I have never known a case where the order of opening altered after the hearing had begun.]

In all petitions for restitution the respondent has to prove just cause and so is called upon to begin. *Cherry v. Cherry* (1) is an example of that. That is the practice, right or wrong, of the Divorce Division.

[TUCKER L.J. Yes, but the ultimate burden of proof still remains on the petitioner.]

That the person on whom the burden of proof lies shall open the proceedings is the practice of all other courts, but for a hundred years the rule has prevailed in the Divorce Division that in a restitution case the substantial point is for proof by the respondent who has raised it. The trial judge has a discretion to follow that practice, and this court ought not to interfere with his exercise of it. The practice may cause surprise to lawyers practising in the King's Bench Division, but it has obtained since *Cherry v. Cherry* (1), if not earlier, and the trial judge ought to be left free to follow it.

(1) 1 Sw. & Tr. 319.

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Linton Thorp K.C., in reply. The question here is whether the husband was justified in keeping away a wife who had left him. That raises the question of her sincerity as a petitioner, and on that question it was for her to begin. In *Cherry v. Cherry* (1) the wife respondent alleged cruelty as just cause for not returning to her husband. She had to prove such an allegation and therefore had the right to begin. *Smith v. Smith* (2) is further distinguishable because there was a cross-petition and it was decided on the allegation of adultery.

TUCKER L.J. By s. 186 of the Supreme Court of Judicature (Consolidation) Act, 1925: "A petition for restitution of conjugal rights may be presented to the court either by the husband or the wife, and the court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly." Before the court can grant such a decree it must be satisfied that a proper case has been made out by the petitioner and that he or she is sincere in the presentation of his or her case. It is the duty of the court to be satisfied on those matters whatever course has been taken by the respondent, or whether the case is defended or undefended. Notwithstanding that the petitioner has ultimately to satisfy the court of these matters, it does appear, I think, from the authorities and the statements in the text books on the practice in the Divorce Division, that the respondent may be allowed to open the case where the pleadings are in the state in which I think the present pleadings are. In *Rayden on Divorce* (4th ed., p. 335) it is stated: "In a suit for restitution of conjugal rights, if, as is usual, the fact of separation is not denied, the respondent begins by proving justification." It is, I think, interesting to observe that in the forms of pleadings in that work (pp. 674 and 675) the common form of allegation in a suit asking for an order for restitution of conjugal rights is apparently: "That on the (blank) day of (blank) the respondent withdrew from cohabitation with the petitioner [without any just cause whatever] and he has refused and still refuses to return to her and to render her conjugal rights." That is the allegation: withdrew from cohabitation and has refused and still refuses. Then the form of the husband's answer is: "1. That he admits that he has

(1) 1 Sw. & Tr. 319.

(2) [1900] P. 66.

"ceased to live with the petitioner, but says that by reason
 "of the facts hereinafter stated he had, and still has, just cause
 "for refusing to live with her" The pleadings in the
 present case follow this precedent: the petition contains the
 allegation that the husband withdrew from cohabitation with
 the wife and has ever since refused and still refuses. The
 answer admits that the husband has ceased to live with the wife
 and says that by reason of the matters thereinafter set out he
 had, and still has, just cause for refusing to live with her. I think
 that that answer is always treated as being a confession—an
 admission and a justification. It amounts to an admission
 that the respondent has withdrawn from cohabitation, but
 alleges that he did so for good cause and that, therefore, the
 petitioner is not entitled to the relief sought.

In that state of the pleadings it seems to have been the
 practice in the Divorce Division to allow the respondent to
 open his or her case. I think that, for all practical purposes,
 the pleadings in the present case are to the same effect as those
 in *Cherry v. Cherry* (1). There the husband alleged that his
 wife did "on September 29, 1855, without lawful cause, leave
 "his residence at Burghfield, and did from the said day up
 "to the date of the said petition, to wit, February 15, 1858
 "(with the exception of two or three days in the month of
 "September, 1856) withdraw herself from cohabitation with
 "him, and refuse to render him conjugal rights." In her
 answer the wife denied that "she withdrew herself from co-
 "habitation with the said H. C. Cherry . . . as set forth in
 "the said petition, without lawful cause" and she further
 alleged, in substance, that she was justified in so withdrawing,
 if she did, by reason of the threats of personal violence to
 which she had been subjected. Thereupon the husband-
 petitioner challenged "the truth of the allegations contained
 "in the answer, and joined issue thereon." On those plead-
 ings the Judge Ordinary ruled as follows (2): "I think sub-
 "stantially the affirmative issue is on the respondent. She
 "means by her answer not to deny that she withdrew at all,
 "but she denies that she withdrew without reasonable cause,
 "and specifies that cause, which she is bound to prove.
 "I think, therefore, her counsel have a right to begin."

In *Smith v. Smith* (3) the headnote (in the Law Reports)
 is as follows: "Where a wife petitioned for restitution of

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(1) 1 Sw. & Tr. 319.

(3) [1900] P. 66.

(2) Ibid. 320.

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“conjugal rights, and the husband in answer alleged that “she had committed adultery, and, in a cross-petition, “claimed the dissolution of his marriage on that ground: “Held, that the husband’s counsel ought to begin.” Sir Francis Jeune P., having agreed that the decision in *Cherry v. Cherry* (1) seemed to cover the case, said in giving judgment (2): “I think “the husband’s counsel should begin in the present case.”

We were also referred to *Burroughs v. Burroughs* (3), where the headnote, so far as relevant, states: “When the wife’s “petition for restitution is heard before the court without “a jury, her counsel have a right to begin, though the substantive issue may be raised on the husband’s answer” The Judge Ordinary said (4), referring to *Cherry v. Cherry* (1): “That case was tried before a jury, and in the record for them “the only issue was cruelty. Here the case comes before me “on the whole petition. The petitioner must prove the “marriage, etc., in the usual course, and must therefore begin.” That case seems to me to differ somewhat from the other two cases cited, but I think that it all comes down to the question who has the right to begin in these cases. That must be very largely a matter of convenience, a matter which is often settled by agreement between counsel, and which depends upon the precise way in which the pleadings are framed. The right to begin cannot affect the question where, ultimately, the onus of proof lies. As to that, the petitioner has to satisfy the court on the matters to which I have already referred; but it seems to have been the practice in the Divorce Court for a number of years, with pleadings in the state in which the present pleadings are, to allow the respondent’s counsel to open the case.

I think that the present case is a peculiar one having regard to the course which was taken. Here counsel for the wife opened her case in considerable detail, the question not having been raised at the outset who had the right to begin. It was tacitly conceded that the wife had the right to begin, and her counsel did begin. In those circumstances, I think that she should have been required to call her evidence in support of her counsel’s opening statement before the husband was required to call his evidence. I therefore think that, in the circumstances of this case, and having regard to the turn which the case took, the commissioner was in error in refusing to accede to Mr. Linton Thorp’s submission that the wife

(1) 1 Sw. & Tr. 319.

(2) [1900] P. 68, 68.

(3) 5 L. T. 771.

(4) Ibid. 772.

should be required to call her evidence to substantiate her counsel's opening before he, the husband, was compelled to tender his evidence. The unfortunate result is that the case has never, in fact, been tried. I think that it should be tried in order that justice may be done between the parties and the real issues decided. The case must, therefore, go back for a new trial.

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COHEN L.J. I agree.

WROTTESLEY L.J. I also agree.

*Appeal allowed. New trial ordered.
Decree rescinded.*

Solicitors for the husband: *Woodham Smith, Borradaile & Martin.*

Solicitors for the wife: *Vincent & Vincent.*

Applied. O'NEILL v. O'NEILL. [1949]
2 All E.R. 649.

W v. W AND D

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Feb. 9.

Divorce — Practice — Appeals — Appeal restricted to quantum of damages—No bar to decree absolute—Matrimonial Causes Rules, 1947 (St. R. & O. 523/L.9 and 1757/L.21), r. 40, sub-r. 1—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 189, sub-s. 1.

Willmer J.

A husband obtained a decree nisi of divorce on the ground of his wife's adultery and was awarded damages against the co-respondent. The co-respondent appealed on the ground that the damages ordered were excessive.

Held, that as the appeal was not an appeal against the decree for dissolution of marriage, but only against the quantum of damages awarded, the petitioner was at liberty to have the decree made absolute although the appeal had not been heard.

EX PARTE SUMMONS to the judge in chambers (1) to show cause why the decree nisi pronounced in a divorce suit should not be made absolute.

On December 17, 1947 the husband petitioner was granted a decree nisi of divorce on the ground of his wife's adultery

(1) The case has been reported with the leave of the judge.

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with the co-respondent. The adultery was admitted, and the co-respondent had only contested the case on the issue of damages.

On January 16, 1948 the co-respondent lodged a notice of appeal expressed: "... by way of appeal from an order of ... made the 17th day of December, 1947 whereby he pronounced a decree nisi dissolving the marriage ... and condemned the appellant in the costs of the suit and ordered the appellant to pay the sum of 1,000*l.* by way of damages into court within fourteen days. The grounds of appeal are that the damages ordered are excessive."

Six weeks after the date of the decree nisi the petitioner's solicitors made application for the said decree to be made absolute. By r. 40, sub-r. (1) (1) the registrar must be satisfied on an application to make absolute a decree nisi that no appeal against the decree nisi is pending; and it was deemed desirable that it should be decided by the judge whether this rule was applicable to an appeal by a co-respondent limited to the quantum of damages awarded against him.

William Latey for the petitioner submitted that although there had been judicial approval and sanction from the Court of Appeal in *Lloyd-Davies v. Lloyd-Davies* (2), prior to the Matrimonial Causes Rules, 1947, for the practice whereby an appeal against a decree nisi acted as a stay against the decree being made absolute, this stay operated only on appeals against decrees nisi. Here there was no appeal against the decree dissolving the marriage but an appeal merely on the quantum of damages. A claim for damages against a male adulterer

(1) The Matrimonial Causes Rules, 1947, r. 40, sub-r. (1.):
"An application by a spouse to make absolute a decree nisi pronounced in his favour shall be made by lodging in the Registry where the cause is proceeding a Notice of Application in accordance with Form 14 on any day after the expiration of the period prescribed for making such decree absolute. The Registrar having searched the Court Minutes and being satisfied: (a) that no appeal against the said decree is pending,

"(b) that no order has been made by the Court of Appeal enlarging the time for appealing against the said decree (or, if any such order has been made, that the time so enlarged has expired),
"(c) that no appearance has been entered ... by or on behalf of any person wishing to show cause against the decree being made absolute, the notice shall be filed ..."

Sub-r. (2): "Upon the filing of the said notice the decree nisi shall become absolute."

(2) [1947] P. 53.

might be made either in connexion with a divorce suit or separately under s. 189, sub-s. 1 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), reproducing s. 33 of The Matrimonial Causes Act, 1857, and such claim had to be tried on the same principles and in the same manner as actions for criminal conversation were tried immediately before the commencement of the Matrimonial Causes Act, 1857. It was clearly a separate proceeding from the suit for dissolution and cases had been reported where such claims had been presented separately and damages awarded. In what was perhaps the leading case on this point—*Kent v. Atkinson* (2)—Hill J., in awarding damages on a petition presented after the marriage had been dissolved by the death of the wife, held that a petition for damages was independent of and not ancillary to a petition for divorce. Therefore the rule or practice as to a stay on appeal did not apply to the appeal on damages only.

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WILLMER J. This is not an appeal against the decree for dissolution of marriage; it is only an appeal by the respondent against the order awarding damages against him. The petitioner therefore is at liberty to have the decree made absolute forthwith.

Decree absolute.

Solicitors: *Corner & Co.*

(1) The Supreme Court of Judicature (Consolidation) Act, 1925, s. 189, sub-s. 1: "A husband
" may on a petition for divorce or
" for judicial separation or for
" damages only, claim damages
" from any person on the ground
" of adultery with the wife of the
" petitioner."
(2) [1923] P. 142.

J. B. G.

GLEN LINE, LIMITED v. W. J. GUY & SONS.
THE GLENAFFRIC

1948

Jan. 20.

Scott,
Bucknill and
Somervell L.JJ.

Shipping — Collision — Tug and tow — Towage agreement — Construction—"Whilst towing"—"When the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines".
—United Kingdom Standard Towage Conditions.

By the terms of a towage agreement made on April 4, 1947, the plaintiffs agreed to attend with two tugs on the following day on

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the defendants' steamship *Glenaffric* and to assist her from the Barry Roads into the Barry Dock. The agreement was subject to the United Kingdom Standard Towage Conditions, cl. 1 of which so far as material provided: "For the purpose of these conditions, the phrase 'Whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines, or when the towrope has been passed to or by the tug whichever is the sooner . . ." Clause 3, so far as material, provided: "The tugowner shall not whilst towing, bear . . . damage of any description done . . . to the tug and the tugowner shall not, whilst at the request expressed or implied of the hirer rendering any service other than towing, be held responsible for any damage done to the hirer's vessel and the hirer shall indemnify the tugowner against any claim by a third party . . ."

On April 5, at about 6 a.m. the tugs in performance of the agreement approached within 20 or 30 feet of the steamship which was at anchor with her anchor lights burning in the Barry Roads about $1\frac{1}{2}$ to $1\frac{3}{4}$ miles from the Barry Dock. Those in charge of the *Glenaffric* hailed the tug *Standard Rose*: "We are not ready. Clear away or Keep away." The master of the tug dropped astern but kept his engines working to stem the tide until he saw the anchor lights of the steamship replaced by the navigation lights. He then steamed within about 20 feet of the steamer. He was then hailed: "Don't want you yet. Wait till we get in a bit." The tug stood off again, and when the steamer had drawn nearer to the dock he approached again all ready to receive ropes or lines and take the ship in tow. He was told that no rope would be passed then and was ordered to take a message to the dockmaster to say that the ship would not dock that tide. In dropping astern to obey that order his tug struck the ship and sustained damage to herself, for which the tugowners claimed to be indemnified under the conditions of the towage agreement.

Held, that on the true interpretation of the agreement and the application of it to the facts of the present case the plain meaning of the words in cl. 1, namely: "When the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines" were not susceptible of modification by implying the additional words: "and the ship is ready to give orders." It was expressly provided that "whilst towing" was deemed to cover a period of time before the towing proper actually began. The tug was in that position and the plaintiffs were entitled to be indemnified in respect of damage to the tug by virtue of the provision of cl. 3 of the conditions.

APPEAL from the decision of Judge Thomas given at the Cardiff county court on October 10, 1947.

The plaintiffs, W. J. Guy & Sons, owners of the steam-tug *Standard Rose*, claimed damages from the defendants, Glen Line, Ltd., owners of the steamship *Glenaffric* in respect of

damage suffered by the *Standard Rose* on April 5, 1947, while the tug was standing by the steamship in the Barry Roads to render towage assistance into the Barry Dock in compliance with an agreement made on April 4. The defendants denied liability on the ground that the period of time which came within the definition of "whilst towing" had not begun and that that part of the clause in the conditions of the agreement relating to the indemnity for damage to the tug did not apply.

Further facts appear in the judgment.

The judge held that the indemnity condition applied and gave judgment in favour of the plaintiffs.

The defendants appealed.

A. J. Hodgson and *J. H. Hewson* for the appellants. The short point in the case is the interpretation of the words "whilst towing" within the meaning of cl. 1 of the conditions. The second part of the clause deals with what happens where the tug is in attendance but not actually towing. The effect of the last-mentioned part is that the vessel to be towed is only liable for third party claims. There was no dispute that there was an agreement here to supply tugs. It has been conceded that the clause in question must be construed strictly against the tug. The facts are immensely material. It was argued below that the parties were never *ad idem*. The contract is an agreement to make an agreement.

[SOMERVELL L.J. No. It is a binding agreement.]

Under the standing agreement, if the tug went out to meet the ship, it would be "attending" the ship under cl. 3 of the conditions.

[SOMERVELL L.J. There are three classes of liability here : (1.) Whilst towing the hirer pays for every form of damage ; (2.) the hirer pays for all damage to third parties ; (3.) only the hirer pays for damage done to the tug.]

Paragraph 1 did not apply where the tug was ordered to go in with message to the harbour master. There were six essential facts in the present case : (1.) Although two tugs were employed only one approached the ship ; (2.) no rope was ever passed in fact ; (3.) the tug was ready and willing to pick up the lines ; (4.) the ship was never ready and never intended to pass a rope ; (5.) the tug was hailed from the ship to keep off ; (6.) the collision occurred after the last hail. The judge below completely disregarded the intention of the ship to take the tow when the tug was in a reasonable position to tender her

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services and in a reasonable position to take the ropes or lines. This must be treated as a bi-lateral arrangement. Counsel referred to the *Uranienborg* (1).

P. Bucknill for the respondents. The decision of the judge was right. The evidence of the pilot who ordered the tug to "sheer off and wait" was more favourable to the tug than the tug master's own evidence. Nothing need be read into cl. 1 of the conditions. The purpose of the clause was to give a wide meaning to the words "whilst towing." The tow was the sole authority to give orders.

[SCOTT L.J. If the tow leads the tug to believe that the tug will be wanted then the words "whilst towing" operate.]

When the navigation lights were exhibited in place of the anchor lights it was an indication that the ship intended to proceed towards the dock. It must have been after that that the ship decided not to dock that tide. [He was stopped.]

A. J. Hodgson replied.

SCOTT L.J. The whole case depends on the proper interpretation of the contract made on November 22, 1939, between the parties and the application of it to the facts of the case. The memorandum of agreement then made was very sketchy and general, but quite definite and clear in its effect. The main object of getting a regular agreement was to have a permanent agreement for rates of towage to be paid by the shipowners to the tugowners from time to time as their ships came to be dealt with by the tugowners. Those rates were to be subject to fluctuation between the parties. I read from it: "The tugowners to receive at least twelve hours' notice of ordered tugs. Tugs ordered and not used to be paid half rates. All tug services subject to the United Kingdom Standard Towage Conditions. This agreement subject to 'three months' notice of termination by either party." We were told that those conditions have been in operation for a great number of years. Curiously enough they have never come before the courts, or, at any rate, before the High Court, except once in 1936 in a case which was considered by Lord Merriman P., namely, *The Uranienborg* (1), to which I will refer presently.

The Standard Conditions are obviously of great importance because they are in general use. They begin with the clause upon which the decision in this case mainly depends: "For

(1) [1936] P. 21.

" the purpose of these conditions, the phrase ' whilst towing ' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines, or when the towrope has been passed to or by the tug, whichever is the sooner." Clause 3 contains the following: " The tugowner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug, or done by or to the hirer's vessel "— then there are a number of words which are irrelevant—" and the hirer shall pay for all loss or damage and personal injury or loss of life, and shall also indemnify the tugowner against all consequences thereof, and the tugowner shall not, whilst at the request expressed or implied of the hirer rendering any service other than towing be held responsible " for any third party damages.

Omitting the irrelevant matter in that cl. 3, the words we have to deal with are these: " The tugowner shall not, whilst towing, bear . . . damage of any description done . . . to the tug." The tugowner brought an action in the county court for the damage done to the tug and the learned judge decided in favour of the tugowner awarding him damages, and the shipowner has appealed to this court. Mr. Hodgson has argued the case carefully and forcibly, but I am against him. Mr. Peter Bucknill, for the tugowner, has made his points clearly and I think he is right.

The substantial question is whether the words I have read from cl. 1—" when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines " cover the occasion in question. The facts are these. The vessel was lying in Barry Roads about a mile and a half or a mile and three-quarters from Barry Dock. The two tugs went out there but the tug in question, the *Standard Rose*, is the only one we need trouble about. The master of the tug was called. It was a dark morning. The tug came up on the starboard quarter, the ship heading down channel, the tide running pretty strong up channel. The ship was carrying the usual anchor lights. The tug got to a point twenty or thirty feet away from the ship. The master of the tug was ready to receive orders and to heave a line aboard the tow. This was in accordance with usual practice, the tug's mate being ready to heave the line. " Received " order to keep away by word of mouth." Presumably from pilot. Then he gives us what the hail was: " We are not

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"ready. Clear away." He then went away and dropped astern leaving the ship still at anchor, but kept his engines going, just to stem the tide. High water was at 8.30, rather more than two hours later. After a time he saw the ship's navigation lights put on, and then increased his speed and went up within twenty feet of the ship again, and was then told: "Don't want you yet, wait till we get in a bit." He dropped astern again and waited until the ship had got further ahead and then again approached her. He received an order not to receive a rope but to go to Barry to tell the dockmaster that the ship would not dock on that tide. He adds that he was ready to take the ship in tow, and that as he dropped back, he touched the ship on her starboard quarter, and received the damage. He delivered the order to the dockmaster. Then he adds: "Normal practice for tug to take over before 'anchor is hove.'"

Then the pilot was called for the shipowners. He spoke to the first occasion and said he "told the tug to *keep* away," not to *go* away, but to *keep* away. He came back a second time and that intimation was repeated and the tugmaster called out: "I understand you were hailing us." A few minutes after that the pilot decided to anchor the ship as the windlass was found to be out of repair and evidently could not be repaired by tide time. It was then that he hailed the tug to inform the dockmaster. That was at about three-quarters of a mile from the breakwater light, the ship then being under way and not again at anchor. He adds: "When 'navigation lights came on it would be normal thing for tug 'to come up and receive orders. Told him 'Sheer off and 'come up when we are closer in'; but for the windlass 'trouble we should have docked that morning.'"

The learned judge decided in favour of the tugowner as against what apparently was the chief argument on behalf of the shipowner, which was that it was not the practice, or that it was not reasonable, for the tug to offer its services until two cables length from the dock. The judge took the view, very properly, that there was nothing in the contract to that effect and that to add that term was impossible, and he rejected it. On his note that is the only defence that was put in.

Before us Mr. Hodgson made six points. He said: (1.) That only one of the two tugs approached the ship. That is the only one we are concerned with, and that is agreed. (2.) That no towrope was ever passed, and that is agreed. (3.) That the

tug was ready and willing to pick up a line, that is agreed. (4.) That the ship was never ready and never intended to pass a line to the tug. (5.) That the tug was hailed three times to keep off, and (6.) that the damage occurred only after the tug had been told to go to Barry as she was not wanted to tow on that tide. In my view, there is nothing in any of those points that saves the defendants from liability to pay. The question really is whether we can imply from the language which I quoted from cl. 1 any words modifying the plain meaning of the words used. In my view, we cannot. The words are quite simple. The provision in cl. 1 is that "whilst towing" shall be deemed to cover a period of time before the towing proper actually begins, namely, a period "commencing when the tug is in a position to receive orders direct from the hirer's vessel to "pick up ropes or lines." It is quite clear, on the evidence, as the learned judge held, that the tug was in that position. The mate was standing by ready to heave the line and so pick up a rope from the ship, and I reject Mr. Hodgson's argument because in order to make it good, he has to read into the clause, after the words "when the tug is in a position to receive "orders," the further words "and the ship is ready to give "orders," which are not there. Had that been the intention of the parties to the contract or even those who framed the Standard United Kingdom Conditions, obviously some such words would have been inserted in the clause. They were omitted, and I think it is clear why they were omitted. After the tug has arrived at the ship at a proper time, namely, the normal time in accordance with ordinary practice, in order to take the ship in tow, she is from then in attendance on the ship, and necessarily then begins to incur the risk of damage to herself by contact with the ship. After that, obviously, as it seems to me, there can be no justification for implying the suggested words. Such an additional condition, protecting the shipowner, could easily have been expressed, and I can see no ground for implication according to the ordinary rule of construction that nothing can be implied, unless it is necessary to give efficacy to the business bargain that the two parties must have intended when they made the contract. Mr. Hodgson did not actually submit that those words ought to be implied, but unless they are this argument must fail.

Mr. Hodgson referred to the case of *The Uranienborg* (1) because it is the only case where these conditions of towage have

(1) [1936] P. 21.

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been previously considered. That was quite a different case. There the tug was employed to go to a wharf in the Thames where the vessel was discharging, in order to tow her from her wharf after discharge or to assist her in her passage from the wharf by towing. The tug arrived before the vessel was ready, at a time when the discharging was still going on. In my view, one answer to the question, which was raised in that case indirectly, is that the primary condition precedent to the whole business of towing, namely, that the ship was ready to be towed, had not come into operation, and the learned President so held. He deals, on p. 28 of his judgment, with an additional reason which I think I ought to read. "Mr. Bateson argues that the "*Tanga* quite plainly was in a position to receive orders to "pick up ropes or lines. This is true in the sense that she was "within 300 feet and within hailing distance, but in no other "sense; she knew that the time was not ripe and was acting "accordingly. There is not a shred of evidence from the "*Kenia* that anybody, from the master downwards, was even "thinking in terms of ropes and lines at the material time. "Certainly they had come there in order to be available for the "towing whenever the towing began. At the moment that "this collision occurred they were not thinking about, and "had not begun to expect, an order to pick up ropes or lines." In my view the appeal must be dismissed.

BUCKNILL L.J. I agree and will add a few words on two points. The first is this. Mr. Hodgson suggested that the second part of cl. 3 of the Standard Towage Conditions applied to this case, in that at the time of the damage the tug was rendering a service other than towing, namely, she was going in to Barry to tell the dockmaster that the ship was not going to dock on that tide. I think if the word "towing" there is to be construed in the light of cl. 1—and Mr. Hodgson admitted that that was so—it is important to notice that in cl. 1 the period is covered until the tug is safely clear of the vessel. In this case the tug was never safely clear of the vessel and if she was "towing," within the meaning of cl. 1, when she had come alongside and was in a position to comply with orders to proceed to pick up ropes she was not clear of the vessel at the time the damage was done.

The other point I should like to say a word about is this. I fully appreciate, speaking for myself, the point Mr. Hodgson made that this must be to some extent treated as a bi-lateral

arrangement, and if the master or the pilot made it clear to the tug before she got into the position to receive orders that he was not ready to give orders, then the tug could not, by putting herself in a position to receive orders, bring herself within cl. 1. But that does not cover the case where, as Somervell L.J. suggested in argument, a ship leads the tug to believe that she is ready to give or take a towrope. I think in this case the facts led the tugmaster to believe that the ship would be ready to give a rope and, therefore, that argument does not apply to the facts of this particular case.

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SOMERVELL L.J. I agree and in particular I agree with what has just fallen from my brother Bucknill. I would like to cite in that connexion a sentence from the learned President's judgment in *The Uranienborg* (1). He says: "I think also "that this phrase"—he is referring to the conditions which we are considering in this case—"has to be read as if there were "two parties involved in the matter, and that until the moment "has come at which orders may reasonably be expected to be "given from the ship the tug cannot be said to be in a position "to receive orders from the ship." That expresses the view which I have taken after listening to the arguments on this clause, and I think on the findings of fact as they appear in the learned county court judge's judgment—reading them as one is entitled to with the evidence—the tug did in this case reasonably expect orders to be given from the ship, that is to say orders in relation to towage, and in those circumstances it seems to me that the clause applies and that the learned county court judge was right in the conclusion to which he came.

Appeal dismissed.

Solicitors for the appellants: *Bentleys, Stokes & Lowless, for Alsop Stevens & Co., Liverpool.*

Solicitors for the respondents: *Ingledeu, Brown, Bennison & Garrett, for Ingledeu & Sons, Cardiff.*

(1) [1936] P. 21, 29.

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May. 1.

Willmer J.

THE EMPIRE GULF.

Shipping — Salvage — Apportionment of award as between the members of the crew—Equal amount of war risk money paid to each member irrespective of rank—Additional to basic wages—Method of assessment.

The owners, master and crew of one vessel were awarded a sum of money for salvage services rendered to another vessel of which sum a stated amount was awarded to the crew. At the time of the services every member of the crew was receiving as war danger money an addition of 10*l.* monthly to his basic wages irrespective of his rank or status on board. The crew applied to the court on motion for a ruling on the question whether the crew's share of the award ought to be apportioned among them in proportion to their respective basic wages or whether the war danger money ought to be added to their respective basic wages for the purpose.

Held, that the proper basis of apportionment was in proportion to their respective basic wages only, and that the war danger payment ought to be disregarded for this purpose.

MOTION.

In October, 1946 the motor vessel *Empire Gulf* rendered salvage services to the motor vessel *Palmyre* and on November 25, 1947 the owners, master and crew were awarded 11,000*l.* for their services 1,400*l.* of which sum was to be paid to the members of the crew.

The present applicants were the crew of the *Empire Gulf* who sought a ruling as to the method of apportionment which ought to be adopted in assessing the amount of each member's share. During the war and for some time after 10*l.* monthly was paid to every member, whatever his rank or status on board, in addition to his basic rate of pay. The question for the court was whether each member's share should be calculated on the basic wage only or with the war risk money added to it.

G. N. W. Boyes for all parties. All grades were paid the same amount of war risk money, namely, 10*l.* Since April 1, 1947 that payment has become perpetuated in the basic wage. Ordinarily, salvage money awarded to the crew has been apportioned to each member according to rating. Counsel referred to *The Petter* (1); and to *Miller v. Owners of the Ship Otilie* (2). In that case war risk money was involved.

(1) (1942) 72 Ll. L. Rep. 134. * (2) [1944] K. B. 188.

[WILLMER J. That was a special case under a particular section of the Workmen's Compensation Act.]

Overtime is not taken into consideration when apportioning a crew's award.

[WILLMER J. Wages is the best guide in making an apportionment ; the addition of war bonus gives a wrong impression. (See Kennedy on Civil Salvage, 3rd ed., at p. 199 and a note on the *Armus*.)]

There the crew were of three classes in regard to rates of pay, namely, those engaged in the United Kingdom, those engaged at a higher rate in the U.S.A., and those on naval ratings partly paid by the owners and partly by the Admiralty. The share of the crew was divided on the United Kingdom rate.

WILLMER J. In my judgment, the correct method of apportioning among the crew their share of the salvage award in question is, in the circumstances of this case, on the footing of their respective basic wages.

It appears that this is a matter on which there is no authority.

The reason for my conclusion is that stated by me during the course of the argument, namely, that the basic pay seems to me to be the best guide in ascertaining the status of the various persons entitled to share in the fund. If one adds on the war bonus, which (except in the case of cabin-boys), is paid at a flat rate regardless of rank or status, one gets a distorted view of the relative status of the respective parties. And if one proceeds to base a salvage award on that, the resulting award would be unfairly weighted in favour of the lower paid ratings and against the higher paid officers. Only by excluding the war bonus, and by restricting one's consideration to the basic pay, does one come, in my judgment, to a fair assessment of the relative merits and the relative rights of the various members of the crew.

Order accordingly.

Solicitors for all parties: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

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Jan. 23.

Divorce — Separation deed — Covenant by wife for weekly payment to husband during joint lives—Dissolution on wife's petition—Application after decree absolute to discharge covenant.

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Asquith L.J. and
Harman J.

A separation deed contained a covenant by the wife to pay to the husband a weekly sum of 5*l.* during their joint lives. She later obtained a decree of divorce on the ground of the husband's adultery and after decree absolute applied to discharge the covenant. Willmer J. discharged the covenant, and the husband appealed.

Held (1.) No question of anything analogous to total failure of consideration or frustration of a contract enters into a case of this kind. (2.) The power of the court to vary settlements is in no sense a penal jurisdiction, and no question of inflicting a penalty on the guilty husband can arise. There is no authority for excluding the possible destitution of the guilty husband from consideration; it is one of the relevant circumstances, all of which it is the duty of the court to take into account. (3.) In view of the fact that Willmer J. had misdirected himself on these matters, it was the duty of the court to exercise its own discretion. On the facts (including additional material) they came to the conclusion that the covenant ought to be discharged, and therefore affirmed Willmer J.'s decision, though for different reasons.

APPEAL from Willmer J.

The parties were married in 1914, and there were two daughters of the marriage born in 1918 and 1920 respectively. The parties separated many years ago, and after they had lived apart for about seven years a formal deed of separation was entered into in 1937, under which the custody and control of the daughters was given to the wife, who covenanted to pay to the husband 5*l.* a week clear of tax during their joint lives. There was no provision in the deed for the determination of the payment in the event of dissolution of the marriage. The wife later petitioned successfully for divorce on the ground of the husband's adultery, and the decree was made absolute on January 27, 1947. The wife then applied to vary the separation deed and to be released from her covenant to pay the husband the weekly allowance of 5*l.*

Willmer J. held that "as the husband by his act of adultery, "which had led to the dissolution of the marriage, had brought "about a fundamental change in the status of the parties, and "as the whole foundation on which the covenant was based had "been cut away, the settlement should be varied by discharging

"the covenant in question." In giving judgment he drew an analogy from a contract in which the consideration had wholly failed.

The husband appealed.

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Colin Duncan for the husband. There is no doubt that a separation agreement is a post-nuptial settlement within s. 192 of the Judicature (Consolidation) Act, 1925. Since *Jump v. Jump* (1) and *Cooper v. Cooper* (2) the contrary is unarguable. In a matter of discretion it is not enough that this court might have taken a different view, but here it is submitted that Willmer J. applied wrong principles. The analogy from total failure of consideration is misleading as applied to this jurisdiction. Nor is it right to exclude the possible destitution of the husband, or to treat the matter as concluded by the change of status brought about by the decree absolute. The registrar acted on the right basis in saying that the parties were already separated when the covenant was entered into, and the wife should not be allowed to tear up the agreement entered into. He referred also to *Constantinidi v. Constantinidi* (3); *Prinsep v. Prinsep* (4); *Colclough v. Colclough* (5).

[ASQUITH L.J. In *Bosworthick v. Bosworthick* (6) a bond by the wife was discharged.]

Theodore Turner K.C. and *F. Wishart* for the wife. On the authorities, the learned judge was not binding himself by any erroneous principle. But even if he was, this court may exercise its own discretion and should arrive, we submit, at the same conclusion. The overriding principle is that the court must consider the facts of the particular case, and the fact that this was a separation deed is merely one of the facts. In *Wigney v. Wigney* (7); *Boynton v. Boynton* (8); and *Gladstone v. Gladstone* (9); the court indicated that the normal thing would be to extinguish the guilty husband's interest. *Prinsep v. Prinsep* (4) was distinguishable, because there the fund was provided by the guilty husband.

LORD GREENE M.R. This is an appeal by the husband respondent in a divorce suit, against whom a decree was

(1) (1883) 8 P. D. 159.

(2) [1932] P. 75.

(3) [1905] P. 253.

(4) [1929] P. 225.

(5) [1933] P. 143.

(6) [1927] P. 64.

(7) (1882) 7 P. D. 177.

(8) (1861) 2 Sw. & Tr. 275.

(9) (1876) 1 P. D. 442.

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obtained by the wife, and for convenience I shall call them husband and wife, although the decree has now been made absolute on the ground of the husband's adultery. They had been separated, in fact, for a good many years, and after the separation had continued for some six or seven years they entered into a formal deed of separation. It was an application by the wife to have the settlement constituted by that deed varied pursuant to s. 192 of the Judicature (Consolidation) Act, 1925, which has given rise to this appeal.

The separation deed was dated October 4, 1937. The parties were the wife, the husband and a trustee. The deed recites unhappy differences, agreement to live apart, and agreement by the wife to make her husband an allowance of 5*l.* per week free of income tax during the joint lives of herself and her husband for his maintenance and support. That sum she covenants by the deed to pay to the trustee who holds on a protective trust for the benefit of the husband. The deed contains many of the usual clauses in a separation deed, a covenant to live apart, covenants by the husband not to molest the wife and by the wife not to molest the husband, provisions as to furniture and so on, the wife to have the sole custody and control of and over the two daughters of the marriage and their education and bringing up. Then there is a proviso that if the spouses should come together and cohabit again the payment of 5*l.* should cease. On the face of it that covenant is expressed to be a covenant for joint lives. It is not expressed to be a covenant which is to determine in the event of the marriage being dissolved while both parties were alive. Nevertheless, it had in it necessarily an element of potential change in this sense, that it was made under the then existing state of the law, which, of course, has endured for nearly a hundred years, that settlements of this kind are always subject to variation by order of the court in the event of the marriage being dissolved. The two daughters of the marriage were at the time well on in their 'teens and now, of course, they have for several years passed their majority.

The application to vary the settlement asked for a complete cancellation of the covenant to pay 5*l.* in favour of the husband. The matter came before the registrar who made a report in which he expresses his opinion that there were no grounds for varying the deed. The main factor which led him to that conclusion is, I think, expressed in para. 7 of the report as follows: "It will be realized that she covenanted to pay this

“ money to this man at a time when for all practical purposes they had ceased to be husband and wife, and it is now suggested that this one night adultery and the decree of dissolution based thereon afford sufficient grounds for tearing up the agreement into which the petitioner entered with the assent of her advisers.” The wife appealed and Willmer J. allowed the appeal and varied the settlement by extinguishing that particular covenant. For the husband it is said that although the discretion of the judge in matters such as this is not to be interfered with by the Court of Appeal, save on well known principles which I need not recite, the judge’s judgment shows that he did, in fact, misdirect himself in law by adopting a wrong principle and excluding from his consideration certain matters of fact which he ought to have taken into consideration. As against that argument it is said, first of all, that on the true construction of the judge’s judgment he did not apply any wrong principle or misdirect himself: secondly, that the facts of the case were such as amply to justify the judge in coming to the conclusion that he did and making the order that he did, and that he must have had those facts in mind, and that his judgment must be read on the footing that he came to his decision in reference to them. Thirdly, it is said that if that be wrong and the judge’s judgment can be attacked on the ground that it is based on a wrong principle, this court, in those circumstances, would have a free hand to come to such conclusion as on the facts it thought was a just result.

I will deal, first of all, with the argument with which Mr. Duncan opened the case, namely, that of the suggested wrong principle adopted by the judge. The real basis of his judgment, I think, was the fact, as he said, that the dissolution of the marriage had brought about a fundamental change in the status of the parties, in other words, that at the time of the separation deed their relative positions were still those of husband and wife with the possibility of reconciliation, whereas the effect of the divorce was entirely to change that mutual relationship. In connexion, I think, with that argument he said this: “ As was pointed out by counsel, one can perhaps look by way of analogy at the principles governing an ordinary contract; it could very well be said, if this were an ordinary contract, that the consideration in respect of which the weekly payment was agreed to be made had now wholly failed.” If those words mean what I

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confess they appear to me to mean, with all respect to the learned judge he was guiding himself by a principle which cannot be supported. The analogy of an ordinary contract appears to me to be misleading. No question of failure of consideration, no question of anything like frustration, can come into a case of this kind under this particular jurisdiction. On the other hand, the nature of the particular settlement which it is sought to vary, the circumstances in which it was made, the circumstances in relation to which it was executed, are, in my view, relevant facts for the court to consider. That is very far from saying that the result is anything like the result which occurs with an ordinary contract in the case of failure of consideration. The judge says that the dissolution of the marriage was the fundamental consideration. Then he goes on to say this: "I can see no ground for the argument put forward by Mr. Latey, founded on the cases where the guilty party was the wife, that a guilty husband should not be left in destitution. I do not agree that the principle on which those cases were decided furnishes a valid reason for not making the variation asked for in this case. To apply that principle in this case would, I think, be breaking entirely new ground. I do not feel disposed to do so." There, it is said—and again I confess I think the argument is right—the judge really is saying that if the guilty husband is going to be left in destitution by a variation of the settlement "that is a fact which the court has not in the past considered and I, as a judge, am not going to be the first to consider it." In other words, it seems to me he was really excluding from his mind as a circumstance relevant to consider, that particular circumstance of the alleged destitution of this husband.

We were not referred to any case in which provision was made for a guilty destitute husband. In *Wigney v. Wigney* (1), however, Jessel M.R. said this: "It was the course of the House of Lords in marriage annulling bills to allow maintenance to a guilty wife, and it would be reasonable for the court in the same case to exercise its discretion in the same way, but it would not be right to make the same provision for her if guilty as would be made if she were innocent. In the case of a husband similar considerations must be entertained. Suppose a guilty husband is incapacitated by physical infirmity from earning a livelihood, and has no means of his own, I do not say that no provision can in any

(1) 7 P. D. 177, 181.

"case be made for him out of the wife's property." Had the learned judge had that guidance in his mind he would not, I think, have expressed himself in the way in which he did express himself in the paragraph to which I have just referred.

In the result, giving the best consideration that I can to the matter, I cannot avoid the conclusion that the learned judge's reasons for exercising his discretion cannot stand, and that his judgment is open to attack on that ground. The true position, I think, is this—and I think it flows from the authorities which have been cited to us—that when circumstances have arisen which under the statute entitle the court to entertain an application for variation of a settlement the matter, so to speak, is at large. There is a complete discretion in the judge as to the order he shall make which is restricted only by the ordinary principles that govern a judicial discretion. In other words, whatever is relevant he may, and should, take into consideration. He should not exclude from his mind a matter which in fact is relevant. When I say "relevant" I mean this, so nearly touching the matter in issue as to be such that a judicial mind ought to regard it as a proper thing to be taken into consideration.

There are certain things which the courts have said are irrelevant, and the judge exercising a discretion is no more entitled to take an irrelevant matter into consideration than he is to exclude relevant matters. When one comes to consider the relevant matters the answer on a great many points is mere common sense. We know that certain matters are irrelevant. For instance, it has been laid down quite clearly and never, so far as I know, disputed that the element of punishment, the idea that this is some sort of a penal jurisdiction against the guilty spouse, is to be excluded; it is nothing of the kind. If a judge were to make an order based on the mere fact that a person was guilty and with the idea of punishing that person as being a guilty person that order could not stand. On the other hand, matters which may, I think, be taken into consideration are the relative financial position of the spouses, the question of how one or other or both of them will be affected if matters are left as they are, the position of children, obviously, in cases where children take an interest in the settled property, or where one or other of the parties undertakes by contract or by law the maintenance of infant children. I am not myself prepared to exclude the consideration of the position even of adult children

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who may take no interest in any settled fund. I can well understand it being said, without deciding it, that for a parent to be reduced to destitution and beggary, even if he be a guilty parent, is so disadvantageous to the members of the family, including the adult members of it, that the court ought to avoid producing that result if it fairly can.

In the present case there was a number of additional facts, which, although not put in evidence in a formal way, were admitted by counsel when the matter came before the learned judge. We were told what they were and there is no dispute about them. They bore on various matters which are undoubtedly, in my opinion, relevant matters.

I have already said that a relevant matter, in my opinion, is the nature of the document itself and the circumstances in relation to which it was executed. It is not a conclusive matter by any means, but a matter not to be excluded, and to be given such weight as the judge may think right. There is an essential difference between a separation deed and, say, an ante-nuptial settlement, because a separation deed is clearly contemplating, and is executed in contemplation of, an abnormal state of affairs. But I think it is wrong, as I have already said, to regard the continuance of that state of affairs as something essential before the guilty party can be left to the enjoyment of the benefits under the document or some of them.

The additional facts put before us are relevant because they bear on the means of the parties and certain other material circumstances. The evidence shows that the wife came from rich parents, she has considerable expectations and her present income is in the order of 2,000*l.* a year. Of the two children, one is, unfortunately, a patient in a home and is being supported by her mother, who is also supporting the infant child of that child. The husband has re-married. Shortly after the decree absolute, which was in January, 1947, the husband swore an affidavit which was in evidence before the judge and the registrar on the present application. He swore that affidavit on April 8, 1947. He starts by saying: "I am entirely dependent upon the 5*l.* a week payable to me under the said deed of separation. I have no assets or property and no earnings. I am endeavouring to build up a business for the manufacture of matches but in the present position of industry cannot guarantee any success whatever and am deriving no income of any kind from the venture. Nor have I any income from

"any other source than the deed." Then a little lower down he says this: "Having regard to the petitioner's large fortune and her covenant to pay me this stipend, and to my poverty and age"—he was, apparently, sixty-three at the time he swore this affidavit—"I humbly crave that this honourable court will leave the deed undisturbed." When that was first read to us I got from it the impression that we were dealing with an elderly man with no real means of support who would be left entirely destitute if this allowance of 5*l.* were to be withdrawn. It appears, however, that that is far from being the case. First of all, he has re-married and all the indications point to the fact that he was already married at the time he swore that affidavit. If he was not married he was quite clearly engaged to the lady whom he afterwards did marry. Before the registrar there was in evidence a letter from the husband dated March 4, 1946, a year before that affidavit was sworn, and before the divorce proceedings began. In it he says that in the near future he intends to give the necessary evidence for divorce and he goes on: "My prospects are exceedingly good as there is now little doubt about the match." That, we are told, means there was no doubt he was going to marry the lady that he did in fact afterwards marry. Then he goes on: "Now regarding the 5*l.* per week, in any case I shall probably be able to do without this by the end of the year." He then says that when the divorce is made absolute the covenant under the separation deed will end, as his solicitor advises. That, of course, was not correct, but that was the belief under which he was proposing to get married, namely, that the 5*l.* would be cut off. Then he says: "As I can assure you that the moment I can do without such a payment from you I shall stop it as I know how exceedingly short of money you must be as it seems you are keeping everyone. What I want to feel is that I can have the 5*l.* per week if, and only if, it is absolutely necessary." He then refers to the lady he is going to marry: "The lady I am marrying has also made a condition, that is, that she wishes you to feel that I am free to come down to see you at any time regarding Pam, etc., as she feels you have had a hell of a time with her. It is very nice of her, I think, to ask for this, although it is not necessary as I shall be exactly the same to you and the children as I am now, in fact it will be a home for Pam to come to if it is necessary. The lady I am marrying is in a 500*l.* a year post and is keeping it on but has expecta-

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" tions of inheriting money. I have plenty of money to pay for the divorce as I have just sold the 26 garages I purchased for 2,200*l.* at Putney for 4,000*l.*—and I get one third of the profit, which is about 550*l.*" Then he also says : " I have also a little money invested." That appears to me to put a very different complexion on the financial position of the husband and the financial position of the wife, because here he is in this letter, with full knowledge of the facts, knowing what the financial burden on the wife is owing to the fact that she has to maintain this invalid daughter and the little granddaughter I have mentioned, proposing to marry and saying that his prospects were exceedingly good. Indeed, he was marrying a lady with money and an income of her own, in a position which was bringing her in a good income, and she had expectations. With his eyes open and in the belief that his marriage is going to lose him the 5*l.* he still, nevertheless, proposes to marry.

I cannot accept the view that Mr. Turner proposed, that the judgment must be construed and approached on the footing that the learned judge really decided this case on the facts of the case including in particular the facts mentioned to us by Mr. Turner which are not actually in the affidavits. If he had been doing that he would, I think, have said so. I am forced to the conclusion that the duty of this court is to exercise its own discretion on the facts before it. It seems to me that this is a case where we must have in mind another relevant fact. I have not attempted to give a category of the facts which the court can consider ; I am only considering the relevance of certain facts in this case. One fact which is certainly relevant is that this money, provided by the wife, if the settlement is allowed to stand as it is, will, or may, go into the ordinary household expenses of the husband and his new wife and help in the maintenance of his new wife. I am not saying that that is a conclusive consideration—it is not ; but it is a consideration which the court ought to have in mind and weigh together with all other relevant considerations. So here we have a wife who, in contemplation of a separation which has come to an end, has entered into a personal covenant for the payment to her husband of a weekly sum, a husband who was the guilty party and was responsible for the termination of the marriage and altering the whole outlook, if one may so call it, of the separation deed. He is not destitute by any means but a man who, in the belief that he is going thereby to lose

the 5^l. on marriage, is nevertheless proposing to marry a lady who, he says, is a lady of means and expectations. In those circumstances, I have to ask myself what is the course this court ought to adopt. In my opinion, the order made by the learned judge, although for a different reason, must stand, and the appeal must be dismissed with costs.

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ASQUITH L.J. I am in complete agreement with the judgment just delivered and desire to add nothing.

HARMAN J. I agree.

Appeal dismissed.

Solicitor for the husband : *Victor F. Deeks.*

Solicitors for the wife : *Haslewood, Hare & Co., for Mayo & Perkins, Eastbourne.*

J. W. H.

Applied. FAIRMAN v. FAIRMAN. _____
[1949] 1 All E.R. 938.

Criticised and Doubted. GOWER v. GOWER. [1950] 1 All E.R. 804.

Considered. DAVIS v. DAVIS [1950] P. 125

GINESI v. GINESI.

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Husband and wife—Adultery—Standard of proof required.

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Feb. 4, 5, 6.

Adultery must be proved with the same degree of strictness as is required to establish a criminal charge.

Tucker and
Wrottesley L.JJ.
and
Vaisey J.

Quære, whether a similar strict standard of proof is required in respect of other matrimonial offences.

Dictum of Lord Merriman P. in *Churchman v. Churchman* [1945] P. 44, 51, approved so far as applicable to adultery.

Decision of the Divisional Court (1947) 63 T. L. R. 545 affirmed.

APPEAL from the Divisional Court.

The appellant husband applied to Bradford Petty Sessions for discharge of a maintenance and separation order which his wife, the respondent, had obtained against him on the ground of his wilful neglect to maintain her. The ground of his application was the alleged adultery of his wife with one Birkett. The bench consisted of the Bradford stipendiary magistrate sitting with a lay justice. The magistrate in a reserved judgment said that, while it might be that the wife and Birkett had not committed adultery, the probability that they had was so great that the bench ought to hold adultery proved. The magistrate took into account such circumstances as the nature of the friendship between the wife and the man and the facts that she was living apart from her husband and

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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that the man was a widower. The Divisional Court allowed the wife's appeal, holding that the same strictness of proof was required in the case of the matrimonial offence of adultery as in the case of an ordinary criminal offence, and that the magistrate had not observed that principle. The husband now appealed.

J. E. S. Simon for the husband.

Scott Henderson K.C. and *R. T. Barnard* for the wife.

There was no dispute as to the standard of proof required to substantiate a charge of adultery. The authorities on that question cited by counsel at the request of the court are referred to in the judgment of Tucker L.J.

TUCKER L.J. In the course of his judgment in the Divisional Court Hodson J. said (1): "It might be desirable if I were to say at once what I mean by the standards of proof in this class of case. It is a matter of history that in matrimonial cases, adultery having been described as a quasi-criminal offence, the standard of proof is a high one, and if authority is required it is to be found in the language used by Lord Merriman P. in *Churchman v. Churchman* (2) where he says: "The same strict proof is required in the case of a matrimonial offence as is required in connexion with criminal offences properly so called." Counsel for the husband does not dispute that that is an accurate statement of the requirements of proof of adultery in divorce proceedings; but as, apparently, there has been no pronouncement on this matter from this court to which our attention has been drawn, we thought it desirable that the authorities should be called to our attention.

We have been referred to the ancient ecclesiastical authorities beginning with Sanchez's "Disputationum" of 1626. The author states that "suspicio probabilis" is not sufficient and that what is required is "suspicio violenta," "quia hæc sufficit ad condemnandum." From Oughton's "Ordo Judiciorum," in Titulus CCXIII., paras. 3 and 4, it appears that what is really required is *vehementes præsumptiones* as distinct from *suspicio probabilis*. Going on to later ecclesiastical authorities, we find Sir George Hay stating in *Rix v. Rix* (3) that: "Ocular proof is seldom expected; but the proof should be strict, satisfactory, and conclusive." Then we have the great authority of Lord Stowell in two cases. First, he said, as Sir William Scott, in *Williams v. Williams* (4) in reference to an

(1) (1947) 63 T. L. R. 545, 546.

(3) (1777) 3 Hag. Ecc. 74.

(2) [1945] P. 44, 51.

(4) (1798) 1 Hag. Con. 299.

undefended case: "This proves a great facility, at least, and will make the court more vigilant to see that the two main points of such cases are sufficiently proved, namely, the criminal act, and that the person against whom the proof of that act is established, was the wife." Of the requirements to establish such proof, he said in *Loveden v. Loveden* (1): "The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." Coming down to more modern times, we were referred to the speech of Lord Buckmaster in *Ross v. Ross* (2), where, referring to proof of adultery, he said (at p. 7): "It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, for example, letters and diaries, or antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence." Lord Atkin said (3): "But from opportunities alone no inference of misconduct can fairly be drawn unless the conduct of the parties prior, contemporaneous, or subsequent justifies the inference that such feelings existed between the parties that opportunities, if given, would be used for misconduct." I am satisfied that Hodson J. was correct when he said that adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence—and I limit my observations to cases of adultery. Adultery was regarded by the ecclesiastical courts as a quasi-criminal offence, and it must be proved with the same strictness as is required in a criminal case. That means that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact.

In this case, I think, reading the judgments of the Divisional Court, that they were disposed to take the view that the stipendiary magistrate, who delivered a reserved judgment, had misdirected himself with regard to the standard of proof required when, at the end of his judgment, he said: "Well it may be that they had not committed adultery. There is just the possibility that they had not, but the probability

(1) (1810) 2 Hag. Con. 1, 3.

(3) Ibid. 21.

(2) [1930] A. C. 1, 7.

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“ that they had is so very great that, in my opinion, we should “ hold that adultery has been proved.” I think that the Divisional Court were inclined to the view that, in using that language, the stipendiary was deciding the case on the balance of probability. I do not so read those words myself. They are not, perhaps, words which should be chosen in isolation in directing a jury in a criminal case ; but I think that, if a judge had directed a jury that they had to be satisfied beyond all reasonable doubt and had then added the words used by the stipendiary for the purpose of explaining what was a reasonable doubt, no exception could have been taken to the use of such language. Therefore, I am not satisfied merely from reference to that language that the stipendiary misdirected himself or his fellow-justice as to the standard of proof required. Whether or not he in fact applied to the facts of this case that same strict requirement of proof is another matter altogether.

The functions of an appellate court, in hearing an appeal from an inferior tribunal to which has been committed the task of deciding questions of fact are considerably limited. This matter has recently been discussed—by no means for the first time—by the House of Lords in *Watt v. Thomas* (1). I refer to what has already become a well-known passage in Lord Thankerton’s speech, in which he summarizes the principles (2) : “ I do not find it necessary to review the many decisions of this “ House, for it seems to me that the principle embodied “ therein is a simple one, and may be stated thus : (I.) Where a “ question of fact has been tried by a judge without a jury, and “ there is no question of misdirection of himself by the judge, “ an appellate court which is disposed to come to a different “ conclusion on the printed evidence, should not do so unless “ it is satisfied that any advantage enjoyed by the trial judge “ by reason of having seen and heard the witnesses, could not “ be sufficient to explain or justify the trial judge’s conclusion. “ (II.) The appellate court may take the view that, without “ having seen or heard the witnesses, it is not in a position to “ come to any satisfactory conclusion on the printed evidence. “ (III.) The appellate court, either because the reasons given “ by the trial judge are not satisfactory, or because it un- “ mistakably so appears from the evidence, may be satisfied “ that he has not taken proper advantage of his having seen “ and heard the witnesses, and the matter will then become at “ large for the appellate court.” Lord Thankerton goes on to observe that the value and importance of having seen and heard

(1) [1947] A. C. 484.

(2) Ibid. 487, 488.

witnesses will vary according to the class of case, and that in no class of case is it more valuable than in matrimonial disputes. That, therefore, is the angle from which the Divisional Court had to approach this appeal, and it is the angle from which we have to view the judgment of the Divisional Court.

Apart from the criticism directed to that part of the stipendiary's judgment in which he discussed the degree of proof, I think it clear from the judgments of Hodson and Barnard JJ., that they regarded this case as coming under the third of Lord Thankerton's heads, namely, where the appellate court is satisfied, either because the reasons given by the trial judge are not satisfactory or because it unmistakably appears from the evidence that the trial judge has not taken proper advantage of having seen and heard the witnesses, and, therefore, that they regarded the case as coming before them at large. Having examined the case, they came to the conclusion, without hesitation, that those standards of proof had not been observed which are required before a charge so serious at this can be established against two persons.

Our task is to examine the circumstances of the case for the purpose of ascertaining whether the Divisional Court was right in coming to that conclusion. I approach the task with the knowledge that we are concerned with matters of frequent occurrence and often coming before the two judges, whose duty it is to devote a great portion of their judicial time to the ascertainment of matters of this kind.

The facts of the case, which are of no public importance whatever, have to be considered in some little detail in order to come to a decision whether the Divisional Court was justified in interfering with this finding of fact by the bench at Bradford. The husband having failed to provide for his wife's maintenance, she had to take proceedings for provision for herself and her children, and she succeeded in obtaining an order. The order contained a non-cohabitation clause against the wishes of the husband, who was at that time desirous of cohabiting with the wife. The order was made in May, 1941, the husband having been unwilling or having neglected to provide for his wife. The wife and one Frank Birkett, the man with whom she was alleged to have committed adultery, were, according to their unchallenged evidence, lifelong friends. She was aged about thirty-five years and he just over forty. Her evidence, which was not disputed, was that she had known the Birkett family all her life, that Birkett had been a widower since 1941, and that she knew his mother. Birkett's evidence

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was that he had known the wife since they were children, that before her marriage he had seen a good deal of her, that after her separation his younger brother took the wife into the family business as a secretary and employed her, and that when the brother went to the war the wife worked for him, Frank Birkett. Thus, the wife was employed by Frank Birkett and had been a friend of the family ever since she was a little girl. It is beyond dispute that he took her to dances, cinemas and so forth. It is also not in question that the husband was having her watched, for the purpose, no doubt, if the requisite evidence could be obtained, of putting an end to the order which had been made against him. He had three teams of detectives employed on this task, whose combined efforts over a period of time culminated in the present proceedings.

Two occasions are relied on as ones on which adultery was committed, and two only, namely, the night of November 9/10, 1945, and the night of February 13/14, 1946. [His Lordship discussed in detail the evidence relating to those occasions, and continued:] The stipendiary magistrate approached the matter as follows: He emphasized the attractions of these two people and the position in which they were. He said: "We have here a wife separated from her husband, against "whom she made an allegation of cruelty"—I do not think that that was quite correct—"Here we have a young woman "not in the first flush of youth; an experienced woman, but "young enough to be very charming and attractive, and the "man, who, if this were a divorce case, would be called a "co-respondent, a widower, not very old nor very young, a "pleasant and attractive man. Both, therefore, in early "middle age, both of experience and considerable charm and "likely to be attracted to each other. A grass widow and a "widower, and under these circumstances the grass widow "becomes, first of all, shop assistant and then after a while "becomes private secretary to the widower, Mr. Frank Birkett, "and from that time onwards for some years it is quite clear "that there is a very great friendship and affection between "them. They are brought into close contact in the business, "and they go out together to cinemas and dances and other "things, and occasionally they walk out, for one reason or "another, arm in arm. There you have inflammable material, "but it does not follow that they have committed adultery, "but you have opportunity and great mutual attractiveness, "and under these circumstances the husband very naturally "suspects something between these two." The magistrate

discusses the evidence and comes to this final conclusion, after saying that he thinks that most of the evidence of the husband was true : " Having regard to the admissions of the " wife and Frank Birkett that they had twice been together in " the middle of the night, once in the car and once in the office, " a short time or a long time, they said only a short time, and " witnesses said on the contrary it was something over an hour ; " having very carefully considered the evidence, I accept the " evidence that these people were together for a substantial " length of time in the middle of the night in circumstances I " have mentioned. There was a good deal of other evidence " given against them by these inquiry agents, some of which " may not be true, but I have put aside any evidence that I " considered at all doubtful and I accept this position : here " you have two people who are inflammable, in just the cir- " cumstances that may lead to adultery, and they, knowing that " they are suspected, have been together quite a long time in " the dark in the very middle of the night." So it really comes to this, that the justices were drawing inferences from the fact that these two had been together at a time described as the " middle of the night." That, however, has to be considered in relation to the fact that they had been to a dance, which generally does extend to the middle of the night, coupled with the view which they took of the attractive appearance and, perhaps, demeanour of these witnesses. It is, of course, a great asset to the tribunal of fact to observe and consider the demeanour of witnesses. The principal purpose of that observation is to ascertain or test the truthfulness of their evidence. People are not to be convicted of committing adultery because in the witness box they look the kind of people who might commit adultery, unless the evidence is such as to point almost irresistibly in that direction. Then, no doubt, the appearance and demeanour, and so forth, of the witnesses may be very material and of great assistance ; but it would be a very dangerous thing, if the evidence fell short of what is required by way of proof, to fill in the gaps merely from observation of the attractiveness of the witnesses in the witness box. It does appear to me that the stipendiary has placed too much reliance on those matters as a guide to his ultimate decision in what was obviously a difficult case. I think that the appearance and demeanour of witnesses is probably of great assistance to the trial judge where the evidence may otherwise appear very black against them and he accepts their explanation—there I think he is probably on surer ground ; but if the

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 1948 evidence cannot be supplied by mere observation of the
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On the whole, I have come to the conclusion that the view taken by the Divisional Court is correct, that, on a consideration of the whole of this evidence, this charge of adultery was not established by that degree or standard of proof which is required, and that this is a case in which, in all the circumstances, the Divisional Court were entitled to re-open and examine the decision of fact. That court having re-opened and examined it, I entirely agree with the conclusions at which they have arrived.

WROTTESELEY L. J. I agree. The dictum of Lord Merriman P., in his judgment in *Churchman v. Churchman* (1), reads as follows: "The same strict proof is required in the case of a "matrimonial offence as is required in connexion with criminal "offences properly so-called." It will be observed, therefore, that the standard of proof with which we have been concerned in this case is there said by Lord Merriman P., to apply to all matrimonial offences. All that it has been necessary to establish in this case is that that standard applies to the proof of adultery; and, since all the authorities cited to the court are cases of adultery, I only desire to say that, for myself, it seems to me that this court to-day need only lay down that this standard of proof applies to cases of adultery, leaving to other occasions the decision whether it is equally applicable to other matrimonial offences, in addition, of course, to connivance, the offence which Lord Merriman P., must have had in mind in *Churchman v. Churchman* (1).

VAISEY J. I find myself in complete agreement with the judgments just delivered, and would only add supplemental observations. The close similarity of the offence of adultery to acts which are properly to be described as criminal to-day is beyond question. The finding that the offence has been committed may be far more serious in its consequences both to the individual and to society than the conviction of a crime. All that is true even in these days, when its seriousness is not so widely appreciated and accepted as it used to be. On the evidence in this case I should myself regard a *suspicio probabilis* of adultery as made out. Is that enough, however? I think not. Is there a *suspicio violenta*, as Sanchez puts it, or is there

a vehemens præsumptio, which Oughton, in the passage referred to by my Lord, lays down as the requisite standard or degree of proof? Like its English derivative, the Latin word "vehemens" is one of the strongest possible significance. Horace refers to the vehemens lupus, the ravening wolf. There is here, in my judgment, a suspicion but not a "violent" suspicion. There is, in a sense, a presumption, but it is far from being a "vehement" presumption.

Appeal dismissed.

Solicitors for the husband : *Ward, Bowie & Co., for James A. Lee & Priestley, Bradford.*

Solicitors for the wife : *Blundell, Baker & Co., for H. T. Manknell, Bradford.*

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Husband and wife — Nullity — Petition twenty-seven years after marriage — Approval — Sincerity — Effect of collateral motive.

Feb. 11, 12.
Tucker,
Bucknill and
Cohen L.J.J.

Twenty-seven years after his marriage a husband petitioned the court for a decree of nullity on the ground of his wife's incapacity to consummate the marriage. The incapacity was due to a fear of childbirth so great as to cause contraction of the muscles and render intercourse impossible. The husband, throughout the first seventeen years of the marriage, used every proper endeavour to overcome the wife's aversion, and constantly complained of it. At the end of that period he left her, but later, on her promise to overcome her fear, returned to her. After a few weeks, during which he again tried without success to effect consummation, he left her for good. The ten years' delay in filing a petition after cohabitation had ceased was due to the husband's poor financial situation as a post-office employee. At the trial he admitted in evidence that before presenting his petition he had realized that, with the arrival of his approaching retirement on pension, he would be unable to keep up two homes, and that that realization had influenced him in bringing the petition. The trial judge held that the husband had approbated the marriage by cohabiting with his wife for seventeen years and enjoying the benefit of her house-keeping which had been efficiently performed; that his collateral financial motive in presenting the petition showed the necessary

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sincerity to be lacking ; and that it would accordingly be contrary to public policy to grant a decree. On appeal by the husband,

Held, that the husband's seventeen years of cohabitation with the wife did not constitute approbation of the marriage having regard to his repeated complaints throughout that period and to his having given his wife the benefit of his consortium though deprived of the normal satisfaction due to a husband ; that the delay in presenting a petition after cohabitation had ceased was excusable by the husband's necessity to save money for the proceedings out of low wages ; that the husband's collateral motive to be rid of financial liability to his wife was not improper having regard to the deprivation which she had caused him, and, not being improper, was no indication of insincerity in presenting the petition ; and that the decision of the trial judge, though arrived at as a matter of discretion, must be reversed because it represented a misapplication of the principles laid down in *G v. M* (1885) 10 App. Cas. 171.

Per COHEN L.J. *Quaere*, whether it would entitle the court in its discretion to refuse a petition in such circumstances, that the husband's sole reason for presenting it was the desire to be rid of financial liability to his wife.

G v. M (1885) 10 App. Cas. 171 discussed and applied.

Nash v. Nash [1940] P. 60 applied.

W (falsely called R) v. R (1876) 1 P. D. 405 distinguished.

APPEAL from Barnard J.

The appellants husband and the respondent, his wife, were married in 1919, being now both fifty-three years old. The husband was an employee of the Post Office earning a low wage. He alleged that the marriage was never consummated during the seventeen years of cohabitation, which ended when he left his wife in 1936, and Barnard J., accepted his evidence that he had tried without success every proper method of persuasion. When the husband left the wife in 1936, she consulted the probation officer, whose evidence, as well as her own, showed that one of the causes of the trouble between husband and wife was the latter's aversion to child-bearing. On her promise to overcome that aversion, the husband returned to her. She nevertheless maintained her refusal to allow complete sexual intercourse, and a few weeks later the husband again left her. In November, 1946, he petitioned the court for a decree of nullity.

Barnard J. accepted the husband's statement that the marriage had never been consummated because of the wife's fear of childbirth, and rejected her statement that during the seventeen years of cohabitation there had been regular sexual

intercourse between them. The judge thought that the non-consummation was due, not to wilful refusal by the wife, but to her uncontrollable fear of childbirth which, causing a contraction of the muscles, made intercourse impossible. The judge, however, refused the husband a decree, on the ground that he had approbated the marriage. He found that the wife had in all respects efficiently looked after her husband, whose only complaint had been of non-consummation of the marriage. Barnard J., took into account the husband's evidence that he had realized some years before filing the petition that his approaching retirement would make him unable to keep up two homes, and the judge therefore had regard to the possibility that the real reason for the filing of a petition twenty-seven years after the marriage was the husband's desire to be rid of the financial liability to his wife. The judge was of opinion that he must take into account the position of the wife, who had enjoyed the status of a wife since 1919 and fulfilled the duties of a wife throughout the best years of her life; and he held that it would be contrary to public policy and an injustice to the wife to grant the husband a decree. The husband now appealed.

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Stuart Horner for the husband. Mere lapse of time is no bar to a plea of nullity. Approbation of a marriage is not an easy thing to bring home against a petitioner where the parties are of modest means as here. Barnard J. finds that for many years the husband has had the benefit of the marriage. The husband, on the other hand, complains that for years he has lived with a wife who has deprived him of one of the chief blessings of marriage. It is no answer to that allegation of deprivation to say that during those years the wife has performed for him wifely duties which are merely those of a housekeeper. [*G v. M* (1) referred to.] Moreover, it cannot, surely, be said that this husband has approbated the marriage when, as Barnard J. has found, he has complained from time to time throughout.

[BUCKNILL L.J. True this is a case of nullity, but is it not a question of a discretionary bar on the ground of lapse of time as in a dissolution case?]

It is submitted not. Having regard to the observations of Lord Watson in *G v. M* (2), it is submitted that there is nothing in the husband's conduct so important, or so recognizing

(1) (1885) 10 App. Cas. 171.

(2) *Ibid.* 197, 198.

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of the marriage, as to render it contrary to public policy that it should be revoked. The position is that the husband went on hoping against hope that things might come right. His conduct reveals the utmost persistence in that respect. To hold that such conduct rendered it contrary to public policy to annul the marriage would put a premium on less good conduct by other husbands in future.

[TUCKER L.J. There may be a collateral motive for seeking nullity. Is the desire to marry again a valid collateral motive ?]

It has been so regarded.

[BUCKNILL L.J. referred to the speech of Lord Selborne in *G v. M* (1) on the question of motive.]

A collateral motive may be laudable and not ulterior: see per Lord Bramwell (2). [*Mansfield (falsely called Cuno) v. Cuno* (3) referred to.]

Law for the wife. The remedy of nullity is given to a spouse as compensation for a wrong suffered; it is not given as an opportunity for obtaining something else. The real reason for this suit is the husband's fear of the financial difficulties which will beset him on his retirement from the Post Office, and not any grievance which he may feel against his wife. [Rayden on Divorce (4th ed.), p. 138, referred to.] The husband has clearly approbated this marriage during all the years for which the wife has served him and looked after his home faithfully. A substantial injustice would be done to this woman if at the end of twenty-eight years as a wife she were to be cast out and deprived of her status as a wife. She has spent the whole of the useful period of her life married to this husband. If he had taken steps earlier she might have been set free to marry another man, by whom she might conceivably have had a child. It would be an extreme hardship on this wife if the husband, after having had the best years of her life as a good housekeeper, could now say that he wanted to be free. She has less chance of marrying again than he has, and has never wanted her marriage to come to an end.

Stuart Horner in reply.

TUCKER L.J. It is worth remembering that the remedy on the ground of wilful refusal only became available to the husband on January 1, 1938. Barnard J., but for the reasons which he gave in his judgment, would have been disposed to

(1) 10 App. Cas. 188.

(3) (1873) 42 L. J. (P.) 65.

(2) Ibid. 201, et seq.

grant the husband a decree on the second alternative ground of his claim, namely, that at the time of the marriage the wife was incapable and has ever since remained incapable. The physical incapacity being inferred from the wife's incurable aversion to sexual intercourse, the case would naturally be presented in an alternative form. The petition was launched in November, 1946, a very long time after the marriage. Delay of this kind, as has frequently been stated, is a very material matter to take into consideration in the event of doubt whether the petitioner has succeeded in proving his or her case, namely, the non-consummation due to the physical defect of the other spouse. In cases of doubt, where there has been long delay, the petitioner often has to suffer as the result of any doubt due to that delay. Barnard J., found no difficulty, notwithstanding the delay, in accepting the husband's proof of non-consummation.

The doctrine of approbation and reprobation was discussed in *G v. M* (1), which is generally regarded as the leading authority on this matter. Lord Selborne after discussing the meaning of the word "sincerity" which is often used in cases of this kind, sincerity being a requirement to be satisfied by the petitioner, said: "My own belief is that, to whatever criticism 'the phraseology of learned judges in those cases may be open (and I must say that the adoption of that particular phrase 'sincerity' seems, as the learned counsel said, to suggest a psychological question rather than one of law or fact, diving into the motives of a person's mind rather than trying whether a cause of action exists or not), I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well now, that explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it are

(1) 10 App. Cas. 171, 186.

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“ various, and in cases of this kind many sorts of conduct might
“ exist, taking pecuniary benefits for example, living for a long
“ time together in the same house or family with the status
“ and character of husband and wife, after knowledge of every-
“ thing which it is material to know. I do not at all mean to
“ say that there may not be other circumstances which would
“ produce the same effect; but it appears to me that, in order
“ to justify any such doctrine as that which has been insisted
“ upon at the bar, there must be a foundation of substantial
“ justice, depending upon the acts and conduct of the party
“ sought to be barred. Further than that I do not think it
“ necessary for the purpose of this case to go. Of course, when
“ facts are in dispute, motive may be all important; but that
“ is not the case here.” The argument had been that delay
was an absolute bar. Lord Watson said (1): “ The first plea
“ against any consideration of the merits of this case was rested
“ upon the rule as to ‘ sincerity,’ or more correctly speaking,
“ insincerity. I agree with the observations which have been
“ made upon the English cases bearing upon that matter by
“ my noble and learned friend the Lord Chancellor. It humbly
“ appears to me that the expression is not a very happy one,
“ and also that it has been used occasionally in circumstances
“ which render it still more inappropriate. I think that when
“ those cases are dissected they do show the existence of this
“ rule in the law of England, that in a suit for nullity of
“ marriage there may be facts and circumstances proved which
“ so plainly imply, on the part of the complaining spouse, a
“ recognition of the existence and validity of the marriage, as to
“ render it most inequitable and contrary to public policy
“ that he or she should be permitted to go on to challenge it with
“ effect.”

Lord Bramwell said (2): “ Now, one word as to this question
“ of ‘ sincerity.’ It is a most remarkable expression, a very
“ curious word, and I am not at all sure that it has not resulted
“ from this, that sincerity is a very important matter in ascer-
“ taining whether the spouse complained of is impotent or not,
“ and sincerity has been dwelt upon for that purpose till at
“ last it has been taken to be a separate head of objection to
“ the complaining party’s proceedings. It seems to me very
“ strange. What the complainant does in a suit of this sort
“ is to come to the appropriate court for a declaration of the
“ truth: ‘ I say that this man is impotent and was so at the

(1) 10 App. Cas. 197.

(2) Ibid. 201.

“ ‘time of the marriage, and I ask you to declare that fact.’
 “ The very words of the summons are, ‘Declare the truth, that
 “ ‘this man was impotent when he married me.’ The court
 “ say, ‘No we will not,’ or the argument is that the court
 “ ought to say ‘No we will not—we know that it is true, but
 “ ‘we will not say so’—why? In my opinion a man who has
 “ inflicted this cruel wrong upon a woman ought not to be
 “ heard to object to her complaining, when she comes forward
 “ with her complaint of this wrong that he has done her,
 “ unless in some way or another he can show that he sustains
 “ some injury from the double matter of her not having
 “ complained earlier, and of her complaining now.”

That is the general principle which has been followed in subsequent cases. In this connexion I would also refer to a case decided before *G v. M* (1), namely, *W (falsely called R) v. R* (2), where Sir Robert Phillimore, after having discussed the question of delay and insincerity, said: “The general circumstances of each case and the facilities of the parties aggrieved for obtaining legal advice and assistance will vary indefinitely, but the conditions to which I have alluded mean nothing if they do not mean this—that the petitioner is bound to have evinced impatience under a sense of wrong and a reasonable activity in complaint and redress. The court cannot recognize these features in the conduct of the petitioner. On the contrary, she appears to have lived contentedly enough with her husband, until, as she says, he ill-treated her.”

Quite recently, Langton J. had again to consider this matter in *Nash (otherwise Lister) v. Nash* (3). In his judgment he said: “Returning now to a consideration of the legal aspect of the plea of ‘insincerity,’ it will be remembered that in nearly every case where this plea has been judicially considered, delay in putting it forward has been the basis upon which its sincerity has been attacked. The limitation upon the ordinary meaning of the word ‘sincerity,’ to which I have alluded above, seems, therefore, to be fairly clearly defined. The petitioner must be sincere in the sense of not having wavered in her view as to the action she will take to assert her rights after she attained full knowledge of the facts and the law concerning those rights. The court will not allow a petitioner, after attaining such knowledge, to approbate the contract of marriage and obtain rights and

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(1) 10 App. Cas. 201.

(3) [1940] P. 60, 69.

(2) (1876) 1 P. D. 405, 410.

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“benefits thereunder for a term of years, and then subsequently reprobate the contract and claim that it is void upon the strength of those very rights which she has long elected to ignore.” That passage very conveniently summarizes the application of the general principle.

Turning to the facts of this particular case, the evidence of the husband, which appears to have been accepted by Barnard J., without any qualification, shows that throughout this long period of seventeen years he was again and again endeavouring to overcome the difficulty, seeking to persuade and coax his wife into having closer intercourse; so much so that, after he had left her, having at last found the position intolerable, he returned and made yet another attempt to overcome the terrible obstacle under which he had been labouring all these years. I find it quite impossible to take the view that up to 1937 the conduct of the husband amounted to approbation of the marriage so as to disentitle him from relief. He was doing his best to remove the difficulty and bring about a normal married state. It is not a case in which he was acquiescing in his wife's disability, and contentedly leading a married life until some incident arose, such as ill-treatment of his wife by the husband, as referred to by Sir Robert Phillimore in *W v. R* (1). This case is different: the husband was throughout seventeen years of his married life showing himself dissatisfied with the state of affairs which existed.

Has he disentitled himself to relief by his conduct? Again, there has been considerable delay before the launching of this petition; but the explanation which he gave with regard to that must be considered as a whole. It must be remembered, first, that he was a poor man, earning from 3*l.* to 3*l.* 15*s.* 0*d.* a week. According to his own evidence, he knew that this remedy was open to him. When asked why he had not brought the proceedings before, he said that in the first place divorce proceedings did not appeal to him. Asked, then, about nullity proceedings, he said: “I have not finished answering your question. In the second place, it had taken me that time since I left my wife to save it (the necessary money).” “I have paid 145*l.*, and there are other expenses.” Pressed to say when he had decided to bring divorce proceedings, he said that he had realized three or four years before that, when he retired from the post office in a few years' time, he would not be in a position to keep his wife and himself, and that that was

one of the reasons why he brought these proceedings. He added that he had no wish to keep his wife.

[His Lordship referred to Barnard J.'s finding with regard to a widow with whom the husband had become acquainted, and who had since died, and continued :] With regard to that I would only observe that their married life had really been undermined long before by the unfortunate attitude of the wife. I cannot see anything to his detriment in his having possibly found attractions elsewhere. It is not suggested that those attractions took the form of sexual intercourse. It seems to me not quite accurate to attribute to the widow the undermining of this married life. The husband, in his poor financial position, had to save up money for the divorce proceedings, for he said in evidence that he was unaware until during the war years of the facilities available to poor persons. His income on his own showing was such that he would, at any rate in the later years, have been disentitled from assistance from the Poor Persons Department. I can find nothing in his conduct after 1937 which either amounted to an approbation of the marriage or would indicate insincerity on his part in instituting these proceedings.

I think, therefore, that this appeal succeeds, and that the husband is entitled to a decree of nullity. I need hardly add that I accept entirely all the judge's findings of fact. I only differ from him in the inferences to be drawn from those findings. I am unable to draw the inference, notwithstanding the long period which has in fact elapsed since the marriage, that this husband has by his conduct approbated the marriage or that there was anything insincere in his approach to the court in seeking this remedy. I need only further observe, that this clearly appears to be a case in which it would be very desirable that the wife should, after all these years, receive some compassionate monetary allowance from the husband; but that matter will, of course, be for the registrar when he investigates the financial position of these people. The case should be referred to him for such an investigation.

BUCKNILL L.J. I agree. As we are differing from the judge I will add a few words of my own. I think it material to note that when the husband left the wife after the interview with the probation officer, he allowed her 27s. *od.* a week and left her the furniture and the house, although he was only earning some 3*l.* a week. Also, in the following year, 1937, he came back for three nights and again tried to consummate the marriage, with

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complete failure. The difficulty of saving up 145*l.* for a man of such very small means can easily be imagined and must account very largely for the delay in bringing the proceedings. The judge ends his judgment by saying that the petition fails on the ground that the husband has approbated the marriage ; but he appears also to have taken into account as a reason for dismissing the petition that the real reason for the petition was the husband's wish to be rid of his financial liability to his wife. With great respect to the judge, if that was a reason, it would seem to me proper. Here was a man about to be put on pension and have his income substantially reduced. He was paying money to a woman with whom he had lived for many years but from whom he had been unable to obtain the ordinary satisfaction of a husband, and unable to obtain what he wanted above all things, a child. If he had a good reason for having his marriage annulled, the fact that by doing so he would reduce his liability seems to me to be a valid consideration.

The cases on insincerity seem to me to indicate that the motive which may prove insincerity must be an improper one. As Lord Selborne L.C. said in *G v. M* (1) : " Can anybody say " that those are motives of a fraudulent character, of a dishonest character, of a character from which there is some " moral estoppel, unless there is a legal estoppel by some " positive rule of law to prevent her from acting upon them, " and getting the truth declared that she is not this man's wife " if in truth she is not ? " Sir John Hannen said in *M (otherwise D) v. D* (2) : " I can see nothing reprehensible in this " motive influencing her, if, in fact, it did influence her, to " bring this suit. This would only show an additional reason " for her really desiring to get rid of the mockery of a marriage " at present subsisting, and would tend to establish the " sincerity, not the insincerity, of these proceedings." In my opinion, the idea that this husband was actuated by some improper motive in bringing this petition is invalid as a ground for Barnard J.'s decision.

As regards the other ground for denying relief, namely, that the husband had approbated the marriage, as I read the speech of Lord Selborne L.C. in *G v. M* (3), any allegation of approbation must be dependent on the acts and conduct of the party sought to be barred. In this case, it seems to me, the judge has overlooked the matters to be weighed in the scales

(1) 10 App. Cas. 171, 188.

(3) 10 App. Cas. 171.

(2) (1885) 10 P. D. 75, 80.

on the other side : he has omitted to bear in mind that during all these years the husband maintained the wife, provided a home for her and gave her his company, and that he paid her an allowance after he left her. She has given him nothing more than what any wife gives so far as domestic service is concerned. If circumstances of that kind are sufficient to defeat a decree on the ground of approbation, it seems to me that every petition based on a charge of nullity would be defeated if there had been any substantial delay, for such facts must exist in every such case. Yet, as Sir John Hannen said in *M (otherwise D) v. D* (1) : "With regard to the delay, that has never by itself "been held to be a bar to a suit of this kind." Similar words are used by Lord Selborne L.C. in *G v. M* (2).

There remains the question whether this is a matter of discretion. I quite appreciate the great reluctance which this court has in interfering with the exercise of discretion by the trial judge, and it does seem to me that this case certainly has what may be called a discretionary aspect. In so far as it is a matter of discretion, however, I think that the judge, despite his great experience in these cases, has misapplied to the facts of this case the rule laid down by Lord Selborne, and that there has in fact been no approbation by the husband. I agree with what my Lord said about the possibility that a compassionate allowance should be made.

COHEN L.J. I agree. I wish to reserve the question whether, if the sole reason for the petition were the desire to get rid of a financial liability, that might or might not be a ground on which a judge might in his discretion refuse to grant a decree notwithstanding that the petitioner was *prima facie* entitled to it. I say this because I am satisfied for the reasons given by my brethren that that was not the sole reason for this husband's petition. On the contrary, I am satisfied as to his sincerity, and if that was a reason, it was only one of many others, and not the main reason for the presentation of his petition. I agree with my brothers' observations with regard to a compassionate allowance.

Appeal allowed.

Solicitors for the husband : *Gustavus Thompson & Sons, for Hillier, Naish & Co., Bath.*

Solicitors for the wife : *Arthur Taylor & Co., for Titley, Long & Co., Bath.*

(1) 10 P. D. 77.

(2) 10 App. Cas. 171.

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Divorce — Maintenance — Secured maintenance — Securities specified and agreed—Death of respondent prior to execution of relevant deed —Enforcement against executors—Jurisdiction of Divorce Court—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 43, s. 190, sub-s. 1.

When an order for secured maintenance has been made under s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, and agreement has subsequently been reached between the parties as to the subject-matter to be provided as security, the order does not of itself create a floating charge over all the assets of the party who is to give security: but the joint effect of the order and agreement is to create a charge on the subject-matter so specified; and such charge will remain effective notwithstanding the supervening death, prior to execution of an appropriate deed, of the party against whom the order was made and may be enforced against that party's personal representatives.

By virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 43, the Divorce Court has equal jurisdiction with the Chancery Division to give effect to such an order and charge.

SUMMONS ADJOURNED into court for argument and judgment. The following extract from the judgment summarizes the relevant facts.

Summons by Rose Margaret Hyde, the successful petitioner in a divorce suit, against the executors of the late Thomas Grimshaw Hyde, the respondent in the suit, to show cause why they should not be ordered to execute a deed giving effect to an order of the Divorce Court dated February 14, 1947. The decree of divorce was made absolute on September 24, 1946, and on October 2, 1946, the petitioner filed her notice for ancillary relief. On February 14, 1947, an order for maintenance was made in the petitioner's favour under both sub-s. 1 and sub-s. 2 of s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. On April 2, 1947, the respondent died. The order under sub-s. 2, which ordered the respondent to pay to the petitioner until further notice during their joint lives 1,100*l.* per annum less tax, ceased to have effect as from the death of the respondent; and the order under sub-s. 1 was now the subject matter of dispute between the petitioner and the respondent's executors. That order was in the following terms: "It is ordered that the above-named respondent do secure to the above-named petitioner for her life as from the date of the decree absolute herein, to wit the

“ 24th day of September 1946, the annual sum of 1,200l.
 “ less tax upon security to be agreed, or wholly or partially
 “ by covenant if so agreed, and that in default of agreement
 “ between the parties it be referred to conveyancing counsel
 “ of the High Court to settle the necessary deed or deeds.”

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Following on that order the petitioner's solicitors and the respondent's solicitors were in negotiation as to the security to be provided and as to the form of the necessary deed, and before the respondent's death they had reached agreement as to the security to be provided, namely, 15,000 6 per cent. cumulative preference shares of Hyde's Anvil Brewery, Ltd., of which company the respondent had been governing director, to produce 900l. per annum; and as to a personal covenant binding not only the respondent but also his personal representatives to pay the remaining 300l. per annum.

Following on this agreement the petitioner's solicitors on March 27, 1947, wrote to the respondent's solicitors, enclosing a draft deed. The draft deed was neither agreed nor executed by the respondent; and after the respondent's death Messrs. Parkinson, Slack & Needham, solicitors of Manchester, wrote to the petitioner's solicitors on June 5, 1947, confirming that they were acting for the executors of the above-named deceased, that they had obtained from the respondent's solicitors the draft deed of security which they were returning as Mr. Hyde had died, and stating that the order of February 14, 1947, had no operation against his estate. On August 8, 1947, the executors obtained probate of the late Mr. Hyde's estate which was sworn at 150,000l. gross (129,000l. net personalty). Between the date of the decree absolute and the date of the respondent's death, namely, on October 22, 1946, the respondent had re-married, and on his death he left surviving him his widow and two children by his marriage with the petitioner.

Gerald Upjohn K.C. and *John Latey* for the petitioner. The petitioner has a cause of action subsisting against the respondent which survives against his estate. By s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 as amended by s. 14, of the Administration of Justice Act, 1938, the court may vary or discharge any order which is within the section except an order for secured provision. An order for security is final and complete. Such an order creates a charge in favour of the wife: see *Maclurcan v. Maclurcan* (1) per

(1) (1897) 77 L. T. 474, 475.

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Lindley M.R. : "The moment the order was made the wife "had an equitable charge on the property which could be "enforced at once The effect of the order was to create a "property in the wife of which she could dispose." See also *Harrison v. Harrison* (1), *C. L. v. C. F. W.* (2) and *Waterhouse v. Waterhouse* (3). This is regardless of whether a deed has been executed, for the deed is a mere ministerial act, and in *C. L. v. C. F. W.* (4), Lord Merrivale P. contemplated that the court might make an order for the appropriate deed to be executed after the respondent husband's death. The petitioner's right to a charge plainly survived against the estate of the husband quite apart from the Law Reform (Miscellaneous Provisions) Act, 1934; but if necessary reliance is placed on s. 1 of that Act. *Richards v. Richards and Flockton* (5) referred to in *Dipple v. Dipple* (6), establishes that there is a cause of action where the court has once made an order.

The appropriate court to deal with the matter is the Divorce Court — see *Burroughes v. Abbott* (7). See also s. 43 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Noel Middleton K.C. and *Roland Adams* for the respondent's executors.

The summons was directed to the respondent's executors for an order directing them to give effect to the order of February 14, 1947, and to execute a deed in terms of the draft. The executors are not parties to this suit, which was between the petitioner and the respondent, and cannot be made parties, and the summons is misconceived. The vice of the summons is that it treats executors as representing the deceased; they do not represent him but only his estate: "An executor "does not act for a dead man, or in his name, but for the "estate of the dead man"—*Stanhope v. Stanhope* (8). Power contained in s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, is limited to power to require a husband to secure maintenance and gives no jurisdiction over a third party. The court does not make orders against third parties—*Crispin v. Cumano* (9): its jurisdiction is limited to statutory powers and apart from statute it has no powers at all.

This is an attempt to vary an order after death of the

(1) (1888) 13 P. D. 180.

(2) [1928] P. 223.

(3) [1893] P. 284, 287.

(4) [1928] P. 223, 226.

(5) Unreported.

(6) [1942] P. 65, 68.

(7) [1922] 1 Ch. 86, 96, 97.

(8) (1886) 11 P. D. 103, 110.

(9) (1869) L. R. 1 P. & M. 622.

respondent. Executors are not entitled to petition for variation of settlements—*Smithe v. Smithe and Roupell* (1); and if it is sought to make executors liable, that liability must be determined in an action: *Craig v. Craig and Hamp* (2).

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Death has deprived the court of any control of the order. The court has made an order which cannot now be enforced. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 47, shows that the control is over the person. After death wholly different considerations arise, including the conflicting rights of third persons: *Thomson v. Thomson and Rodschinka* (3).

This claim has not been kept alive by the Law Reform (Miscellaneous Provisions) Act, 1934. A claim for maintenance is an application for the exercise of discretionary power. Therefore there is no cause of action against third parties, for if the respondent had not died, there would have been no cause of action; a motion for attachment or for a third party to execute a deed are not causes of action; these are in pœnam. "Causes of action" means infringements of rights. For definition of "Cause of action" see *Read v. Brown* (4), *Cooke and Gill* (5).

By *Dipple v. Dipple* (6) the right to apply for secured maintenance is not a cause of action which survives. Contempt does not give rise to a cause of action. Here there was no neglect or refusal within s. 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, which would have provided the only remedy.

Should the petitioner have some claim against the estate, this is not the court to enforce it. Moreover, the children (who are interested under the respondent's will) are not represented: they and others with interests should be heard.

Upjohn K.C. in reply. It is pure accident that the petitioner is left without the provision she expected from the registrar's order. She has no rights under the Inheritance (Family Provision) Act, 1938. The executors have argued that the court can make an order against the respondent but not against his executors. In the present case an order has already been made, and no further order of that character has to be made at all. Many orders have to be worked out—e.g., taxation of costs—and become operative when worked out. Compare also orders

(1) (1868) L. R. 1 P. & M. 587.

(4) (1888) 22 Q. B. D. 128.

(2) [1896] P. 171, 173.

(5) (1873) L. R. 8 C. P. 107.

(3) [1896] P. 263, 269.

(6) [1942] P. 65.

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for specific performance. The importance of *Maclurcan v. Maclurcan* (1), *Harrison v. Harrison* (2) and *Waterhouse v. Waterhouse* (3) is that they make clear that the petitioner has a charge on the estate—an equitable charge. Where there is a charge, it must be enforceable; and there is nothing in the Act to say death takes away the charge. There was no abatement of this action on the respondent's death; therefore the correct course was to join the executors. Counsel referred to Or. 17, r. 1, and also to *Beaumont v. Beaumont* (4), observing that that case was decided before the alteration of the rules in 1937.

[BARNARD J. Assuming you have a good claim, is this the way to enforce it?]

Yes. The Divorce Court has a statutory jurisdiction under Judicature Act, s. 43. See *Burroughes v. Abbott* (5), *Richards v. Richards and Flockton* (6).

Cur. adv. vult.

BARNARD J. (after stating the facts): Counsel for the petitioner contends that from the date of the order to secure the petitioner had a substantive right to property being in the position of a mortgagee as regards the respondent's property, and that the Divorce Court has jurisdiction to enforce her rights. Counsel for the executors does not admit that she has any such rights and contends that if she has any claim against the respondent's estate the Divorce Court has no jurisdiction to entertain such claim.

I have been referred to a number of authorities by counsel on both sides, including *Harrison v. Harrison* (2), *Craig v. Craig and Hamp* (7), *Maclurcan v. Maclurcan* (1), *Waterhouse v. Waterhouse* (3), *C. L. v. C. F. W.* (8), *Stanhope v. Stanhope* (9), *Thomson v. Thomson and Rodschinka* (10), *Dipple v. Dipple* (11), *Serrao v. Noel* (12), *Burroughes v. Abbott* (13) and *Beaumont v. Beaumont* (4), none of which is directly in point.

It is necessary to consider the precise terms of the order of

(1) 77 L. T. 474.

(2) 13 P. D. 180.

(3) [1893] P. 284.

(4) [1933] P. 39.

(5) [1922] 1 Ch. 86, 96, 97.

(6) Unreported — referred to in

(7) [1896] P. 171.

(8) [1928] P. 223.

(9) 11 P. D. 103.

(10) [1896] P. 263.

(11) [1942] P. 65.

(12) (1885) 15 Q. B. D. 549.

Dipple v. Dipple [1942] P. 65, 68. (13) [1922] 1 Ch. 86.

February 14, 1947. Unlike the order in *Maclurcan v. Maclurcan* (1), which specified certain property on which the annual sum was to be secured, this order does not specify any property on which the annual sum is to be secured ; it merely orders the security to be agreed and does not provide what is to happen failing agreement, since what is to be referred to conveyancing counsel is to settle the necessary deed or deeds : it is not the function of conveyancing counsel to decide what the security is to be.

I do not think it could possibly be said that this order created a floating charge over all the respondent's property : indeed the order itself negatives any such suggestion, since it expressly provides " upon security to be agreed," which must mean by the parties themselves or their respective solicitors acting in that behalf. But as an agreement was in fact come to, all that remained to be done, on the death of the respondent, was the formality of settling and executing the necessary deed or deeds ; as Chitty L.J. said in *Maclurcan v. Maclurcan* (2) : " The order having been made, that terminated the jurisdiction of the court except as to the form of the deed to carry out the order. The charge is given by the order, and the deed is only for the purpose of carrying out the order." I therefore find that by the joint effect of the order and the subsequent agreement the petitioner acquired a charge on specific assets of the respondent, viz., on the above mentioned 15,000 shares.

There only remains for consideration whether or not the petitioner can enforce that order, in the events which have happened, against the respondent's personal representatives in this court. No doubt the petitioner could have sought to enforce her claim in the Chancery Division, but by s. 43 of the Supreme Court of Judicature (Consolidation) Act, 1925, this court can make any order which the Chancery Division could make, and I consider it to be the duty of this court to see that its own orders are carried out.

In *Burroughes v. Abbott* (3) P. O. Lawrence J. rectified a deed securing an annual payment to the wife pursuant to an order of the Divorce Court ; and incidentally he did this after the death of the husband respondent. In the course of the trial P. O. Lawrence J. entertained serious doubts whether the Chancery Division was the proper tribunal to make an order for the rectification of the deed, and his reason for this doubt

(1) 77 L. T. 474.

(2) *Ibid.* 475.

(3) [1922] 1 Ch. 86.

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was that, as the Divorce Court was the tribunal which had ordered the deed to be settled and executed, it might be said that the Divorce Court was the proper tribunal to deal with any question of rectification. To set his doubts at rest, as appears from his judgment (1), he consulted the President of the Probate Divorce and Admiralty Division, who informed him that he thought that it was very desirable that the parties should not be put to the cost of a separate application to the Divorce Court for the purpose of rectifying the deed. The President does not seem to have entertained any doubt that he also had jurisdiction. Common sense seems to dictate that this court should make effective its own orders, and that is the only order I propose to make.

I therefore direct the respondent's executors to execute the necessary deed or deeds to give effect to the order of February 14, 1947, coupled with the agreement subsequently come to between the petitioner and the respondent, that is to say, a deed whereby, of the said annual sum of 1,200*l.* less tax, (a) 900*l.* part thereof shall be secured upon the annual income produced by 15,000 6 per cent. cumulative preference shares of Hyde's Anvil Brewery, L.d. with power to resort to capital for any deficiency, and (b) the remaining 300*l.* thereof shall be secured by a covenant of the executors limited to the estate of the respondent in their hands and applicable for the purpose and not so as to render them or either of them personally liable. In default of agreement as to the actual wording, it will be referred to conveyancing counsel to the court for him to settle for the approval of the court the appropriate deed or deeds. There will be liberty to apply.

Solicitors : *Preston, Lane-Claypon & O'Kelly, for Evershed & Tomkinson, Birmingham ; Gregory, Rowcliffe & Co., for Parkinson, Slack & Needham, Manchester.*

(1) [1922] 1 Ch. 86, 97.

J. B. G.

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Shipping — Prize — Ship — Seizure in enemy port — Enemy flag — Vessel built and controlled by enemy—Enemy port of registry—Claim for release by Dutch beneficiary owners—Vessel built for claimants at their expense under economic pressure by enemy government and placed under enemy flag—Whether amounting to duress—Condemnation.

The whaling factory ship *Unitas* of 29,000 dead weight was built in German shipyards and delivered in 1937 to the order of a company in Germany known as *Verkaufs* which was a subsidiary of a Dutch company, referred to shortly as N.V. which, in its turn, was associated with a British company under an agreement for the equalization of profits. N.V. was, through other of its Dutch subsidiaries, *Marga* and *Saponia*, and a German subsidiary company, *Margarine Union*, the sole shareholders in *Verkaufs*. The affairs of *Verkaufs* were entirely controlled by N.V. from Rotterdam after full consultation, when necessary, with the British Company. There was a German board of directors who met solely for the purpose of giving effect to decisions on policy or management, and had no independent authority. There was in Berlin a body known as the *präsidium*, the members of which were appointed by N.V. to ensure that the decisions taken in Rotterdam were effectively carried out. The *Unitas* was to be the most important unit of a whaling fleet to be constructed to the order of *Verkaufs* under an agreement made between *Verkaufs* and the German Government in 1936. It was alleged by N.V. that the German Government had at first made this proposal and that N.V. had raised objection to it but, on a second approach by the German Government, had acceded because, as N.V. contended, of indications that severe economic pressure would be brought by the German Government which would have involved the risk of confiscation of the assets and accumulated trading profits of *Verkaufs*, (and possibly more drastic action) which had been frozen in Germany as "blocked" or "inland" marks as the result of a German decree forbidding remittances to countries outside. By the agreement of 1936 the German Government insisted on the provisions (1.) that the whaling fleet, when built, should be chartered to a new company to be formed, in which N.V. would have no more than a 50 per cent. interest; and (2.) that the fleet should not be transferred from the German flag without the consent of the German Government. N.V. decided to accept a subsidy by the German Government of about one third of the cost of construction. Accordingly the *Unitas* Company was formed on September 24, 1937, the *Unitas* was completed and delivered and immediately handed over to the company. The ship was registered at Bremen as a German-owned ship, placed under the German flag, and was thereafter controlled by German nationals. The charter party made between *Verkaufs* and the *Unitas* Company provided (*inter alia*) by art. 9 that the vessels should not be used except for legally permitted voyages, and that no voyage should be undertaken that exposed the vessels to danger of confiscation, seizure or capture, and was

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made particularly applicable to perilous areas and war risk.

By art. 10 areas endangered by war were to be avoided at all costs, and Verkaufs were entitled to demand that the vessels be used in a way that precluded any war risk affecting them. The charter was to end on September 20, 1940. After the outbreak of war in 1939 and while Holland was still a neutral, nothing was done by N.V. to dissociate N.V. from the activities of their subsidiaries in Germany, nor did they insist on strict compliance with the conditions of the charter. The *Unitas* was captured in Wilhelmshaven when that port was taken by allied invading forces in June, 1945, was transferred to Methil under naval control and was there formally seized in prize on July 1, 1945. On that date there had been no change in her registration. The writ was issued on July 17, and served on July 18.

N.V. and its two Dutch subsidiaries claimed as sole beneficial owners, the release of the ship to them and for damages for the seizure and detention on the ground that the vessel was placed under the German flag involuntarily and under economic pressure amounting to duress.

Held (1.) that the building of the *Unitas* resulted from the making of a series of contracts, and it is well settled in English law that duress of goods, as distinct from duress of person, does not avail to avoid a contract. Even assuming that duress of goods would suffice in prize law, as distinct from municipal law, there was not sufficient convincing evidence before the court that the transactions with the German government relating to the building of the *Unitas* were concluded under duress. On the contrary there was reason to suppose that it was a sound business proposition voluntarily concluded, and there was no particular circumstance which took the case out of the general rule that the character of the ship was determined by her flag.

(2.) that although the principle in *Daimler Co., Ltd. v. Continental Tyre & Rubber Co., Ltd.* [1916] 2 A. C. 307 was applicable in favour of the Crown, there was no authority for applying it in favour of claimants in prize and it would be contrary to settled principle to do so, and the claim that the whole and sole ownership of the *Unitas* vested in N.V. by reason of the fact that N.V. indirectly held in their German subsidiary Verkaufs was untenable.

(3.) that, assuming that the principle in the *Daimler* case was applicable in favour of the claimants, Verkaufs was a house of trade of N.V. in Germany and N.V. had done nothing while neutral to dissociate themselves from the activities of their subsidiaries in Germany even, for instance, by insisting on the strict compliance with arts. 9 and 10 of the charter party, and nothing to dissociate their organization in Germany from the taint of enemy character. The claims, therefore, failed and the *Unitas* would be decreed good and lawful prize.

APPLICATION by the Procurator-General on behalf of the Crown for a decree of condemnation of the whaling factory ship *Unitas*.

Three companies appeared namely, Lever Brothers, Ltd. and Unilever N.V., a Dutch company, and two subsidiary Dutch companies, Marga and Saponia, and they claimed the release to them of the vessel as parties interested in or as sole beneficial owners of the ship, and for damages and costs arising from the seizure and detention of the ship. All the claimants were associated with a British organization in London. The real claimants were the N.V. and will be hereinafter referred to by that name.

At all material times, so far as the German structure of the claimants' business organization was concerned, N.V. through their Dutch subsidiaries were the sole shareholders of a German company known as Margarine Union, which in turn held all the shares of a subsidiary company of the claimants incorporated in Germany under the abbreviated name of Verkaufs. Before the war of 1939 the control of the German business was exercised from Rotterdam, if necessary after full consultation with the British company which was interested by reason of an agreement for the equalization of profits. A German board of directors of the German subsidiary companies met solely for the purpose of giving effect to decisions taken in Rotterdam and had no independent authority. There was in Berlin a body appointed by N.V. and known as the *præsidium* to ensure that the policies decided in Rotterdam were effectively carried out. On August 1, 1931, the German government issued a decree affecting remittances from Germany and the sum of 7,500,000*l.*, owing by the German subsidiary company to N.V. in respect of loans and raw materials supplied by N.V., was frozen and became "blocked" or "inland marks." This sum was further increased by accumulating trading profits in Germany. In order to solve the problem of getting this sum out of Germany, N.V. had recourse to an "extraction process," and in 1934 an arrangement was entered into with the consent of the German government to place contracts in German shipyards for the building of ships for export to be paid for in reichmarks in Germany. The business of N.V. had not hitherto included shipbuilding. Several vessels were built and exported under this arrangement to the advantage of N.V. and resulted by December, 1939, in reducing the blocked funds from *Rm.* 120,000,000 to *Rm.* 3,000,000.

Further material facts are set out in the headnote.

Le Quesne K.C. and *Quintin M. Hogg* for the Procurator-General. None of the claimants were the legal owners of the

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vessel; their interest was that of shareholders. The *Unitas* was registered in Bremen; it flew the German flag; it was under charter to the German company Unitas Company and less than half the capital of that company was subscribed by Verkaufs. The *Unitas* was clearly liable to be seized in prize. Both the claimants and the Crown rely on the question as to who had control of the vessel. The claimants also rely on duress and say that it was only under duress that the ship was registered in Germany. The enemy flag was conclusive of enemy ownership unless the claimant proves that the vessel is neutral. (See Colombos' Treatise on the Law of Prize, 2nd ed., at pp. 70 et seq; and Oppenheim's Treatise on International Law, V. II, 6th ed., at p. 223.)

[THE PRESIDENT: The point against the Crown is that the principle in *Daimler Company, Ltd. v. Continental Tyre & Rubber Co.* (1) can be used in reverse and the ownership of this vessel can be brought back to Rotterdam.]

The claim here is very different to that of mortgagee; a shareholder is not the owner of the assets of the company in which he owns shares: *The Pedro* (2). The *Daimler* case (1) does not decide the question in issue here and was never meant to decide it. In a question of property a neutral claimant is not entitled to ask the court to go behind the enemy character, whether of vessel or goods, which is either admitted or established. On the contrary the Crown is entitled to ask the court to go behind a neutral ownership to see what enemy control may be behind it. This claim is bound to fail. Verkaufs, on the evidence before the court, must be regarded as a branch of the claimants' organization; it became an enemy company and the ship pertaining to it must be treated as an enemy ship if the claimants did nothing to dissociate themselves from the branch business in Germany. In fact, they did nothing from the outbreak of war in 1939, while they were still neutral, until Holland became involved in 1940: *The Anglo-Mexican* (3) referred to and the observations of Lord Parker at p. 35.

[THE PRESIDENT: I am not concerned with what the claimants did with their business in Germany, but what they did or could have done with regard to the *Unitas*.]

It was impossible to say that this vessel was under neutral control. She could not be chartered or sold except by the German government. Assuming that N.V. was in control the

(1) [1916] 2 A. C. 307.

(3) [1918] A. C. 422.

(2) (1889) 175 U. S. 376.

ship became enemy controlled on the outbreak of war with Holland which became an enemy country after the Germans occupied it. The charter party was a self-imposed disability on the claimants. They could have called on the charterers to return the vessel under the terms of the charter while they were neutral.

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Sir William McNair K.C. and *E. W. Roskill* for the claimants. It must be remembered that the circumstances of this case occurred not during normal years of peace. Germany was under the Nazi regime and was engaged in actual preparation for war. That government would have allowed nothing to be an obstacle to her preparations. Commercial transactions of those times are not to be judged as if they were going on in Germany in a normal way before 1939. N.V. only came to build ships in Germany because of being driven to do so by their assets in Germany having been blocked and which they wished to withdraw from Germany. To build ships for export was no part of their business. The *Unitas* was built in an effort to bring out of the area assets which were locked up in a potential enemy country. It was not a device by the claimants to utilize profits. It was a device by the German government which was short of foreign exchange to get whale oil without resort to foreign exchange. If it had been a commercial transaction the claimants would never have put the ship in the hands of a company of which they had not the control. I submit that economic duress is proved. It is said that in 1939 the claimants could have withdrawn the *Unitas* from German control. They could have done nothing. The law does not require a neutral to go through an empty formality by trying to exercise a right which could be of no avail. The case of *The Glenroy* (1) decides that the court can look behind a corporation. I can find no case in which economic pressure has been called duress because there has never been a totalitarian government before. The act of a totalitarian government ought to be called duress. Dissociation does not apply to a ship. The only ship case to which it refers is *The Leda* (2). If it were it would result in the application of a new doctrine to ship captures. "The whole and sole ownership in the *Unitas* "in every real and business sense" remained with N.V. (see *The St. Tudno* (3)). (*The Marie Glaeser* referred to (4).) I submit that the principle laid down in *Daimler Co., Ltd. v. Conti-*

(1) [1945] A. C. 124, 137.

(3) [1916] P. 291.

(2) (1919) 3 Br. & Col. Pr. Cas.

(4) [1914] P. 218.

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mental Tyre & Rubber Company (1), which was in favour of the Crown was equally applicable, put in reverse, to the claimants, in the circumstances of the present case.

Le Quesne K.C. in reply. The enemy flag, with certain exceptions, was decisive of the enemy character of a ship. None of the exceptions was intended to cover "economic pressure," even of the most extreme kind.

[THE PRESIDENT: Would you be prepared to dispute that if we get something which could be called duress it would bring the *Unitas* within the exceptions?]

The vessel would be liable to condemnation even though the duress caused the vessel to adopt an enemy flag. It might affect the Crown's bounty. The owner must be taken to adopt the flag with all the implications. In this case the circumstances stand a long way off that of the case where there is a mortgage or lien. What was decided in *Maskell v. Horner* (2) was with regard to the payment of money under protest; there is nothing of the kind in the present case. For good business reasons the claimants came to the conclusion to accept the proposal of the German government to build the *Unitas*. There was never any specific threat; confiscation was never, in so many words, threatened. All the evidence goes to show that the transactions in 1936 relating to the building of the *Unitas* were wholly advantageous business propositions. The claimants were not entitled to succeed because they were not the owners of the *Unitas* but were merely shareholders. It is argued against me that a German Prize Court could have condemned the *Unitas* in prize. As a matter of fact the *Unitas* was not under the control of N.V.

Other cases referred to: *The Vigilantia* (3); *The Fortuna* (4); *The Vrow Elizabeth* (5); *The Glenroy* (6).

Cur. adv. vult.

Feb. 20. LORD MERRIMAN P. in a written judgment, after stating the preliminary facts, continued: It appears to be necessary at the outset to refer to two elementary principles of Prize law. The first is laid down in *The Baron Stjernblad* (7). The Privy Council, in an appeal directed solely to this issue,

(1) [1916] 2 A. C. 307.

(2) [1915] 3 K. B. 106.

(3) [1798] 1 Ch. Rob. 1.

(4) [1811] 1 Dods. 81.

(5) [1803] 5 Ch. Rob. 2.

(6) [1945] A. C. 124.

(7) [1918] A. C. 173, 175.

re-stated the principles upon which a claimant who has succeeded in obtaining an order for the release of the subject-matter is also entitled to damages and costs, in the following terms: "The law on the subject is reasonably certain. It is clearly stated in the letter of Sir William Scott and Sir John Nicholl, printed on pp. 1-11 of Pratt's edition of Mr. Justice Story's Notes on the Principles and Practice of Prize Courts, and in the case of the *Ostsee* (1). If there were no circumstances of suspicion, or, as it is sometimes put, 'no probable cause' justifying the seizure, the claimant to whom the goods are released is entitled to both costs and damages. The reason is clear. It would be obviously unjust to compel a belligerent to pay damages or costs where he has done nothing in excess of his belligerent rights, and those rights justify a seizure of neutral property when it is in nature contraband and there is reasonable suspicion that it has an enemy destination. This may be thought hard upon the neutral owner, who will not be fully indemnified by a mere release of his property. So it is; but war unfortunately entails hardships of various kinds on neutrals as well as on belligerents. It follows that the real question to be decided on this appeal is whether, when the goods were seized, there were circumstances of suspicion justifying the seizure."

Applying these principles, it is, in my opinion, clear that whatever view may be taken about the claim for release, the facts already stated as to the ownership and flag of this vessel alone provide "probable cause" justifying the seizure. In my opinion, the claim for damages and costs, which was seriously maintained at the very end of the argument, is untenable, and I propose to say no more about it.

The second principle is that once probable cause for seizure is established by the captors, the burden of proof lies upon the claimants. In support of this principle it is only necessary to cite the most recent re-statement of it by the Privy Council in the *Sidi Ifni* (2). After referring to *The Monte Contes* (3) Lord Roche, delivering the opinion of the Privy Council, says: "As their Lordships point out in that case, it is sufficient in Prize Law for captors seeking condemnation by the Prize Court of seized property to establish that there is reasonable ground for suspicion that the property is subject to be condemned. The claimants whose property has been seized

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(1) (1855) 9 Moo. P. C. 150.

(3) [1944] A. C. 6.

(2) (1945) 1 Ll. P. C. (2nd), 200,

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“ must show to the satisfaction of the court by affirmative evidence amounting to positive proof that the reasonable suspicion is unfounded (see also the *Hakan* (1)). ”

This case was tried on the affidavits filed by the claimants and the exhibits thereto, supplemented by certain further information provided at my request. In so far as the affidavits deal with events and figures their accuracy has not been challenged by the Crown, but the Crown does not, of course, admit the inferences which it is sought to draw therefrom. More than once, in the course of the argument for the claimants, it seemed to be assumed that they were entitled to the benefit of any doubtful inferences. I have therefore thought it necessary to re-state this elementary principle at the outset.

Apart from the formal evidence in proof of the capture, seizure, the particulars of the ship's papers and the service of the writ, no evidence was filed on behalf of the Crown. The evidence on behalf of the claimants is contained in two affidavits and the documents exhibited thereto. The whole is conveniently set out in an agreed bundle, supplemented by the further documents put in at the hearing, the statements in which, so far as they go, though not supported by affidavit, are not challenged by the Crown.

[His Lordship then dealt in great detail with the evidence on behalf of the claimants in affidavits and exhibits thereto sworn by Mr. Paul Rykens, and continued :]

In the two concluding paragraphs of his affidavit Mr. Rykens contends that the building of the whaling fleet was undertaken involuntarily. He says that although his conferences with Dr. Schacht and Herr von Ribbentrop were conducted in a courteous manner, he was never left in any doubt as to the reality of the threats lying behind their proposals, and that he has no doubt at all that if N.V. had not agreed to the building of the whaling fleet in Germany for operation under the German flag, steps would have been taken to confiscate or render valueless N.V.'s assets in Germany, and to restrict to the minimum any further carrying on of business by N.V. in Germany. He submits that N.V. was forced by the German Government into a position in which they had no alternative but to comply with the German government's demands. He draws attention to the difference between the circumstances in which the *Unitas* and the whale catchers came to be constructed in Germany, and those in which the ships for export

(1) [1918] A. C. 148.

were constructed under the extraction process. The latter, he admits, were built voluntarily by N.V. as part of a consistent policy of restricting and reducing N.V.'s interests in Germany, but says that the whaling fleet was built "only as the result of" the direct pressure by the German government."

The rival arguments may be summarized shortly as follows : For the Crown it is argued, in the first place, that in the case of a ship the enemy flag is *prima facie* decisive of her enemy character, and that if there be special exceptions to this rule, there is nothing in the facts of this case to warrant the making of an exception. Secondly, that the ship is condemnable as enemy property.

The claimants, while admitting that the flag under which she sailed is an important consideration, argue that the *Unitas* was placed under the German flag involuntarily and under duress. Secondly, they seek to apply in their favour the principle of *Daimler Company, Ltd. v. Continental Tyre & Rubber Company* (1) and assert that "the whole and sole ownership" in the ship "in every real and business sense" was in N.V. ; (*The St. Tudno* (2).)

To this second contention the Crown replies, first, that the allegation of duress is inconsistent with the allegation of "whole and sole ownership in every real and business sense," but, apart from this inconsistency, submits as a matter of principle that the decision in the *Daimler* case is applicable in prize only in favour of the Crown and not of the claimants, and that the argument of the claimants would mean allowing the nationality of shareholders in the company owning the vessel (and in this case shareholders twice, thrice, or even, as regards N.V., four times removed) to determine her character and ownership. Further, that if the decision in the *Daimler* case is applicable as the claimants contend, the result would be that *Verkaufs* was a house of trade of N.V. in Germany, that the *Unitas* was a concern of that house of trade, and that N.V. on the outbreak of war did nothing whatever to dissociate themselves from that house of trade, or its concerns.

I will deal first with the question of the flag. In Pratt's edition of Story the proposition is thus stated on p. 61 : "Ships are deemed to belong to the country under whose flag and pass they navigate, and this circumstance is conclusive upon their character." But on p. 62 the learned author adds : "When, however, it is said that the flag and pass are conclusive

(1) [1916] A. C. 307.

(2) [1916] P. 291.

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" on the character of the ship, the meaning is this ; that the
 " party who takes the benefit of them, is himself bound by them ;
 " he is not at liberty, when they happen to turn to his dis-
 " advantage, to turn round and deny the character which he
 " has worn for his own benefit and upon the credit of his own
 " oath or solemn declarations ; but they do not bind other
 " parties as against him ; other parties are at liberty to show
 " that these are spurious credentials, assumed for the purpose
 " of disguising the real character of the vessel."

The Vigilantia (1) is cited in support of both propositions, and the later passage is taken from *The Fortuna* (2). In *The Vrow Elizabeth* (3) Lord Stowell said at p. 4 : " I hold the claim to be also against the established rules of law ; by which it has been decided that a vessel, sailing under the colours and pass of a nation, is to be considered as clothed with the national character of that country. With goods it may be otherwise, but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claims of interest that persons living in neutral countries may actually have in them." In laying down the rule, Lord Stowell said that there may be cases of such particular circumstances as to raise a reasonable distinction. He instances the case where, because the Governments of France and Holland had refused, in breach of the Treaty of Amiens, to allow British property to be withdrawn from certain islands otherwise than in ships of France and Holland, and on destination to those countries, the British Government had permitted British ships to put themselves under the Dutch flag for this particular purpose ; and adds that in such cases the particular situation of affairs arising out of this refusal to execute the Treaty, may have entitled such parties to a relaxation of the general rule (*Ibid.* p. 7, and Note (a) thereto). The same principles were applied by Sir Samuel Evans in the first world war (see *The Tommi* (4) and *The Hamborn* (5)). In the latter case Sir Samuel Evans stated the rule thus (at p. 22) : " It is a settled rule of prize law, based on the principles upon which Courts of Prize act, that they will penetrate through and beyond forms and technicalities to the facts and realities. This rule, when applied

(1) 1 Ch. Rob. 1, 13.

(4) (1914) P. 251.

(2) (1811) 1 Dod. 81, 87.

(5) [1918] P. 19, 22 ; [1919]

(3) 5 Ch. Rob. 2.

A. C. 993.

" to questions of the ownership of vessels, means that the court " is not bound to determine the neutral or enemy character of a " vessel according to the flag she is flying or may be entitled " to fly, at the time of capture. The owners are bound by the " flag which they have chosen to adopt, but captors as against " them are not so bound." He then cites the passage from Story already referred to. The criticism of this passage on appeal (1) when Sir Samuel Evans' judgment was affirmed by the Privy Council, does not affect the validity of the principle, but only its applicability to the facts of the particular case.

The only two exceptions to which my attention has been drawn are the cases of *The Palme* and *The Taxiarchis* both referred to in Wheaton, 7th ed., at pp. 152 and 153. These were both cases of vessels whose country had no maritime flag, a particular circumstance which bears no resemblance to the present case. With regard to such cases, however, the learned editor of Wheaton, Professor Keith, says that it is not at all clear that, even in such a case as this, English law would have deviated from its rule that the flag is decisive against the owners and the learned editor of the 6th ed. of Oppenheim's International Law (vol. II, p. 223) says that the circumstance that the vessel was compelled to fly the flag of a maritime state would make no difference to the general rule.

Admittedly the case of alleged duress has never arisen as a " particular circumstance to raise a reasonable distinction." It is manifestly unnecessary to consider whether the handing over of a ship to be sailed under an enemy flag by reason of duress to the person of the true owner would be a particular circumstance, because nothing of the sort is alleged to have occurred. What is asserted is that the building of the *Unitas* as a German ship was brought about by duress of goods under the threat, unexpressed but by no means imaginary, of the confiscation of N.V.'s German property. In support of this contention the decision of the Court of Appeal in *Maskell v. Horner* (2) was relied on; per Lord Reading, L.C.J. at p. 118, citing *Atlee v. Backhouse* (3); and it was argued that the same principle should be applied in prize. But that was a case of payment of money under duress of goods; this is a case of making a series of contracts; and it is well settled in English law that duress of goods, as distinct from duress of person,

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(1) [1918] P. 19, 22; [1919] A. C. 903.

(2) [1915] 3 K. B. 106, 118.

(3) (1838) 3 M. & W. 633.

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does not avail to avoid a contract (see Bullen and Leake, 3rd ed. (1868), p. 49).

In *Oates v. Hudson* (1) Baron Parke says: "In *Atlee v. Backhouse* (2) it is correctly laid down that, in order to avoid " a contract by reason of duress, it must be duress of a man's " person, not of his goods; but that where a sum of money is " paid simply to obtain possession of goods which are wrong- " fully detained, that may be recovered back, for it is not a " voluntary payment."

Even assuming, however, that duress of goods would suffice in prize law as distinct from municipal law I will examine first the arrangements for the construction of the *Unitas* by themselves. It is said that there was nothing to be gained by N.V., but I would observe that it was their deliberate policy, with a view to restricting the accumulation of "inland marks," to invest them through their subsidiaries in the purchase of German businesses. Regarded solely as an investment of "inland marks" in a German business, I have been given no reason to suppose that the building of a whaling fleet was not a sound business proposition. One fact which admittedly had some influence with N.V. was that their trade rivals, presumably because it was to their advantage to do so, had undertaken to build whaling fleets. Moreover, save for the equipment to be paid for in sterling, for which, as has already been stated, they could very easily recoup themselves in sterling, only inland marks were to be employed in the construction.

I have not been informed whether the fleet was in fact completed in time for the 1937-38 season, a point upon which the German government laid great stress and for which they offered every facility; and therefore whether there were two seasons, or only one, with, perhaps, part of another, before the outbreak of war made whaling in the Antarctic impossible. Nor have I had any evidence to suggest that the whaling operations were anything but satisfactory and profitable.

Seeing that almost the whole of the cost of building the *Unitas* was provided out of "inland marks," that the German government contributed a subsidy of 30 per cent. and that it was stipulated that in general Verkaufs were not to be treated any less favourably than the whaling companies founded by their rivals, either as regards the carrying out of operations or the utilization of the profits obtained, and there is no evidence

(1) (1851) 6 Exch. 346, 348.

(2) 3 M. & W. 633.

that these conditions were not faithfully observed in peace-time, it does not seem to me that there was anything inherently unreasonable in the German government requiring that the ship should be a German ship, that she should be chartered to a German company in which German nationals held a controlling interest, and that the whaling fleet should not be sold or chartered outside Germany without the Ministry's consent. Even if the project is to be considered on its own merits, I am far from convinced that it bore signs of being concluded under duress.

But I am unable to accept the submission that it is to be treated in isolation, or that, as Mr. Rykens asserts the fleet was built "only as the result of direct pressure by the German government." On the contrary, it seems to me that the decision to accept the proposal of the German government must have had a close connexion with the "extraction process." In one sense, of course, they were essentially different projects, in that the one did, while the other could not, result in the extraction of blocked marks from Germany. But, as I have already shown, at the beginning of 1936 when the project of building a whaling fleet became the subject of serious consideration, the building of ships under the extraction process was very far from complete.

Having regard to the proportion of tonnage for which contracts were yet to be placed, namely, 213,757 tons, out of a total tonnage of 463,467 tons, it seems to me to be a reasonably plain inference that a large part of the 7,500,000*l.* yet remained to be extracted, and the fact that it is admitted that 2,000,000 blocked marks were extracted between December 31, 1938, and December 31, 1939, which presumably must have occurred during the eight months before the outbreak of war, appears to show that the extraction process never wholly ceased to be effective. It was argued that I had no right to draw any such inference because other methods of extracting the blocked marks might be in operation. I offered the claimants the opportunity of proving that any other effective method was in operation, but the offer was declined.

I do not hesitate, therefore, to draw the inference that early in 1936 the advantage of continuing the extraction process without interruption must have been in the mind of those directing the policy of N.V., and that the risk of this benefit being withdrawn cannot fail to have been a potent inducement to accept the proposal of building the whaling fleet. Putting

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it at its very lowest, the claimants have provided no evidence which satisfies me that this was not the case. In my view, there is no particular circumstance which takes this case out of the general rule that the enemy character of the ship is determined by her flag.

Mr. Rykens complains that from the first introduction in 1931 of restrictive financial legislation the freedom of N.V. to exercise unfettered control over its businesses in Germany was seriously jeopardized. But traders, whether in foreign countries or in their own, are subject to the restrictive financial legislation of the country in which they trade; nor is there anything novel in the idea of some measure of discrimination in favour of native as against foreign traders, or in the attempt to overcome such difficulties by setting up an organization in accordance with the municipal law of the country concerned. I do not doubt that with the coming of a totalitarian regime in Germany, trading conditions became more precarious for foreigners carrying on business there, nor, as I have already said, that the German government would hesitate to bring any such pressure to bear as they thought would serve their purpose. But when it is insisted that this is a case of extreme hardship, I feel obliged to say that I am not concerned with that, but with the strict administration of the law of prize.

Hardship is a matter for the bounty of the Crown. But, after all, it is quite clear from the evidence that after the advent of the Nazi regime N.V., so far from curtailing their trade in Germany, were expanding it by investing their accumulated profits in inland marks in what are described as "comparatively safer investments" in Germany. Presumably they did so because they thought it was the best policy for themselves, and incidentally for their British associates who were equally interested, so to do. This policy still prevailed in 1936. In that year they were, as has been seen, still engaged in the extraction process, a scheme which, while it was of considerable advantage to N.V., was also saving the German government's foreign exchange. If, therefore, the desire to continue this process provided, as I infer that it did, some part at least of the inducement to participate in the German government's whaling schemes, which would not only provide that government with a whaling fleet without the expenditure of foreign currency, but would necessarily result in augmenting the provision of substitutes for the butter which they were openly proclaiming to the world was, figuratively speaking, being turned into guns,

it is hardly a matter for surprise that the Crown should insist on its strict rights when the fortunes of war brought about the capture of this ship in a German port. But however that may be, I am prepared to decide this case on the basis that the flag is decisive of her enemy character. In *The Endraught* (1) one of the group of cases governed by *The Vigilantia* (2), Lord Stowell said: "If the claimant, from views of interest, chose to engage himself in the trade of a belligerent nation, he must be content to bear all the consequences of such a speculation." That sentence seems to me to apply to this case.

Nevertheless, out of deference to the argument upon the other points raised, I will express my opinion about them.

As regards the principle of the *Daimler* case (3), it was argued that this must be applicable in favour of the claimants because otherwise the *Unitas* could have been condemned in a German Prize Court after the German conquest of Holland, on the ground that in every real and business sense the whole and sole ownership of the vessel was Dutch (*The St. Tudno* (4)), while at the same time the Crown seeks to obtain condemnation in a British Prize Court.

To this curious argument there seem to me to be two answers: first, that the German government, having taken every precaution to ensure that the *Unitas* was owned, registered and managed in Germany, and that no change should be made in this respect without their express consent, could have no object in bringing her before a German Prize Court, nor is there the slightest suggestion that they did so. On the contrary, the evidence is that she was treated during the war as a German ship (see the supplementary agreement dated October 21, 1941, and the letter relating thereto). It is true that on July 5, 1941, a Reich Commissioner for the management and control of N.V. was appointed, but this does not affect the point. Secondly, if the *Unitas* had duly been condemned by a German Prize Court, her status would thereby have been determined in face of the world. Therefore, if she subsequently came before a British Prize Court her case would fall to be dealt with not in spite of, but in light of, the fact that she had already been condemned to the German government by a court of competent jurisdiction.

In my opinion, there is no authority for applying the

(1) (1798) 1 Ch. Rob. 19.

(2) 1 Ch. Rob. 1, 13.

(3) [1916] 2 A. C. 307.

(4) [1916] P. 291.

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principle of the *Daimler* case in favour of claimants in prize, though it is clearly applicable in favour of the Crown. (*The Glenroy* (1).) Moreover, it seems to me that it would be contrary to settled principle to do so. The allegation that the "whole and sole ownership" of the *Unitas* resides in N.V. depends upon the fact that N.V. indirectly holds all the shares in *Verkaufs*. In my opinion this claim is untenable.

In *The Primus* (2) Dr. Lushington, during the Crimean War, said that not only the authority of Lord Stowell but every argument he used go the whole length of saying that whoever embarks his property in shares of a ship, is bound by the character of that ship, whatever it happen to be. If he reap the benefit accruing in peace, he must also take the consequence of war.

In *The Pedro* (3) Chief Justice Fuller, delivering the judgment of the majority of the court, says: "It was argued that the *Pedro* was not liable to capture and condemnation because "British subjects were the legal owners of some, and the "equitable owners of the rest, of the stock of *La Compania* "La Flecha, and because the vessel was insured against risks "of war by British underwriters. But the *Pedro* was owned by "a corporation incorporated under the laws of Spain; had a "Spanish registry; was sailing under a Spanish flag and a "Spanish licence; and was officered and manned by Spaniards. "Nothing is better settled than that she must, under such "circumstances, be deemed to be a Spanish ship and be dealt "with accordingly. Story on Prize Courts (Pratt's edition) "pp. 60, 66 and cases cited. *The Freundschaft*, 4 Wheaton "p. 105; *The Ariadne*, 2 Wheaton, p. 143; *The Cheshire*, "3 Wallace, p. 231. Hall on International Law, para. 169."

Moreover, this principle was recognized by Sir Samuel Evans in *The Marie Glaeser* (4). It was suggested in the course of the argument that the word "shareholders" was used in that case to describe the part-owners of the vessel. I have now seen the record and it is clear that the claim was made on behalf of shareholders in the company owning the vessel. The confusion may have arisen from the fact that, as the share certificate of one of the claimants shows, the limited liability company owning the ship was named after her (see also the British Year Book of International Law, 1927, p. 164 to the same effect).

As I do not find that duress is proved, I need not deal

(1) [1945] A. C. 137.

(3) 175 U. S. 376.

(2) (1854) 1 Spinks 353.

(4) [1914] P. 218.

with the argument that it is inconsistent with the allegation that the whole and sole ownership resided in N.V.

That brings me to the last point, the position of Verkaufs as a house of trade. The principle is stated in Story, p. 61, as follows: "So if the agency" (that is, an agent stationed in a belligerent country) "carry on a trade from the hostile country which is not clearly neutral, and if a person be a partner in a house of trade in an enemy's country, he is, as to the concerns and trade of that house, deemed an enemy; and his share is liable to confiscation as such, notwithstanding his own residence is in a neutral country; for the domicile of the house is considered in this respect as the domicile of the partners."

But a neutral having such a commercial domicile in a country which becomes an enemy, is, on the outbreak of war, according to the views held by British courts, allowed a reasonable interval during which he can discontinue or dissociate himself from the business in question. (*The Anglo-Mexican* (1).) See also *The Glenroy* (2), where Lord Porter, delivering the opinion of the Privy Council, says: "In a sense it is a hardship, but the neutral is given a locus poenitentiae if he withdraws from the business carried on in the enemy country, and he may well be called on to elect not to continue to assist the trade of the enemy as the price of rescuing his goods from condemnation."

It is argued that there was nothing that N.V. could do, and that prize law, like English law, does not compel the doing of the impossible. Reliance is placed on the fact that all the German directors resigned from N.V. after the outbreak of war between Germany and this country. So apparently did the British directors; at any rate, the chairman did so. Admittedly N.V. could do nothing after the invasion of Holland, but it is clear that during the time when Holland was neutral Mr. Thomas, a principle member of the Praesidium was still in Germany. But although he has sworn an affidavit in support of this claim, there is not the slightest suggestion that he, or anyone else on behalf of N.V., did anything to dissociate N.V. from the activities of their subsidiaries in Germany, even, for instance, by insisting on a strict compliance with arts. 9 and 10 of the charterparty quoted above. During the war it is true that on October 26, 1943, the British company wrote a letter to the Ministry of War Transport claiming that this whaling fleet, and another with which I am not concerned, were not

(1) [1918] A. C. 425.

(2) [1945] A. C. 141.

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German owned and should not be considered as available for reparations. But that does not seem to me to affect the point that at the time when N.V. were still neutral they did nothing to dissociate their organization in Germany from the taint of enemy character, or to make plain to the British Government where they stood.

For these reasons this claim, in my opinion, fails, and the *Unitas* should be decreed to be good and lawful prize, and I give judgment accordingly.

Decree pronounced.

Solicitor for the Procurator-General: *Treasury Solicitor.*
Solicitors for the claimants: *Simpson, North, Harley & Co.*

H. G.

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IN THE GOODS OF CHALCRAFT, DECD.
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Probate — Wills — Execution — Deceased under influence of drug and dying—Uncompleted signature—Attestation in mental presence of deceased—Wills Act, 1837 (7 Will. 4, and 1 Vict., c. 26).

Where the signature of the deceased is not completed, the court will not necessarily refuse to pronounce in favour of a testamentary document. Although there must either be the name or some mark which has been acknowledged by the testator, the particular circumstances should be considered in deciding the effectiveness of the signature; and it must be decided whether the inference can be drawn that what was written was intended by the deceased to be the best that could be done by way of writing his or her own name.

The court will allow a certain degree of latitude with regard to the attestation by the witnesses when it has been satisfied that the document was properly signed by the deceased and was intended to be of a testamentary character.

The deceased was on her death-bed and had recently been given a large injection of morphia. Certain documents, properly prepared, had not arrived in time, and in the circumstances the document in dispute was drafted and read over to the deceased, who nodded in assent. She was handed the paper to sign, but did not complete her signature, writing "E Chal" instead of "E. Chalcraft." The attesting witnesses signed without delay in her physical presence and shortly afterwards she became unconscious. The document was not expressly stated to be a codicil.

Held, that the document was a testamentary document, and that in the circumstances of the case the partial signature should be accepted; that although the deceased was losing her faculties at the time of attestation she was still mentally present to a sufficient degree to bring the case within the Wills Act, 1837.

Relevant questions as to the righteousness of the transaction and the testamentary nature of the document considered.

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PROBATE ACTION.

The plaintiff, Helen Chalcraft, claimed to be executrix of a will of the deceased dated July 29, 1946, and to have the said will and a codicil thereto, dated December 30, 1946, established. The deceased died shortly after the alleged signing of the said codicil.

The defendants admitted the validity of the will of July, 1946, but said that the said codicil was not duly executed according to the provisions of the statute, in that it was not signed by the deceased; and in the alternative that if it were signed the witnesses did not attest and subscribe the alleged codicil in the presence of the deceased, who had, the defendants said, become unconscious before the witnesses wrote their names. The defendants further alleged that the document was not a testamentary document, that the deceased at the time of the alleged execution of that document did not know and approve of the contents thereof; and that she was not of sound mind, memory and understanding owing to the grave physical disease from which she suffered and the consequential administration of the appropriate drugs. The defendants asked the court to pronounce against the alleged codicil and decree probate of the will of July, 1946, in solemn form of law.

The alleged codicil read: "96, Osborne Road, Acton. "I wish my house to be sold and 500*l.* made over to Mr. C. F. West for purchase of 33, Stilecroft Gardens, E. Chal
"Witness J. E. A E. A. B Dec. 30, 1946."

Details of the above facts are given in the judgment. It had been the intention of the deceased to live with Mr. and Mrs. West when her own house was sold, and to take her daughter Miss Helen Chalcraft (the plaintiff) with her.

C. A. Marshall Reynolds for the plaintiff.

D. Tolstoy for the defendants.

WILLMER J. In this case the deceased, Ellen Chalcraft, was an elderly lady who died on December 30, 1946. She had

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made a will dated July 29, 1946, and on the day of her death she executed a document which has been the subject of the dispute in this action. That document is propounded by the plaintiff, Helen Chalcraft, as a codicil to the will of July 29, 1946 : the defendants contend that the document is not a testamentary document at all. There is no dispute about the will of July 29, 1946. Its execution has been duly proved before me and, so far as that document is concerned, I am abundantly satisfied that it was duly executed in accordance with the provisions of the Wills Act. The deceased had four daughters and one son and, broadly speaking, the effect of the will of July 29, 1946, was to leave her estate—which was only a small one—divided in varying proportions between her various children. The effect of the alleged codicil would be materially to alter the proportions laid down in the will, and, more particularly, would have the effect of benefiting one particular daughter, Mrs. West, and her husband.

The deceased died of cancer, from which she had been suffering for some considerable time. The evidence shows that shortly before her death she was endeavouring to make arrangements to dispose of her house with the idea of going to live with her daughter, Mrs. West, at a new house which Mr. and Mrs. West were in the process of buying. It was also intended that the deceased's unmarried daughter, Miss Helen Chalcraft, who had for some time been looking after the old lady, should go with her to live with Mr. and Mrs. West. It appears from the evidence that Mr. and Mrs. West, even with the help of a building society, were not financially able to complete the purchase of their new house, and the deceased had signified her intention of selling her own house and devoting the sum of 500*l.* out of the proceeds to assist Mr. and Mrs. West with the purchase of the new house. In fact, only a few days before her death, namely, December 19, 1946, she had written to her solicitor instructing him to sell her house for the sum of 700*l.*, out of which she desired to pay 500*l.* towards Mr. and Mrs. West's purchase of the new house. In return for that it was proposed that Mr. West should execute a deed of covenant, whereby he would make himself responsible for maintaining the deceased and the deceased's daughter, Miss Helen Chalcraft, for the rest of their lives. Instructions to prepare that deed had already been given to the solicitors, but it was never executed before the death of the deceased. On December 30, 1946, Mr. and Mrs. West had actually moved into their new

house, but the deceased's proposed contribution towards that new house was still not paid, and the deed was still in the process of preparation.

On the morning of December 30, 1946, the deceased had a very serious hæmorrhage, and had to be assisted on to her bed, where she lay for the rest of the day, and, indeed, for the rest of her life. Her medical adviser, Doctor Bailey, called soon after noon, and formed the view that the deceased was dying ; and, with a view to reducing the intense pain from which the deceased was suffering, the doctor administered a large dose of morphia. I say a large dose. The actual dose at that time was one and a half grains. Up to then the deceased had been taking periodical doses of morphia, under the directions of the doctor, but they were of much smaller strength—during the period immediately preceding her collapse she was taking two quarter-grain tablets at a time.

At that time it is everybody's case that the deceased was perfectly conscious, was mentally alert and knew exactly what she was doing. I think it is also clear from the evidence that she realized at that time how serious her condition then was. Mrs. Giles, one of the daughters of the deceased, and one of the defendants in the action, has given evidence that when she was there in the morning, after the deceased had had the attack, the deceased said in effect that if anything happened she would like Mrs. Giles to see that her arrangements were carried out.

Unhappily the dose of one and a half grains of morphia was not sufficient ; in fact, it apparently had no appreciable effect in reducing the pain of the deceased. So that when the doctor called again, somewhere about half-past two in the afternoon, it was considered necessary to administer a further and larger dose of morphia. This time the deceased was given an injection of three grains of morphia, that is to say, twice as much as the morning dose, and the doctor says in terms that that dose was intended to last the deceased for the rest of her life, as she (the doctor) was satisfied that the deceased had no more than a few hours to live.

Before the final visit of the doctor, Mr. West had called on the deceased, who was clearly agitated about her condition and anxious to complete the legal arrangements to which I have referred. On the instructions of the deceased Mr. West was sent to fetch the solicitor, so that the solicitor might bring round the deed which he had been preparing, with a view to its being executed. Unfortunately, the solicitor did not in fact

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arrive until some considerable time after the deceased had lost consciousness.

On the occasion of the doctor's second visit there was a short consultation between the doctor and Miss Helen Chalcraft, as a result of which Miss Helen Chalcraft made up her mind that the only safe course of action to take was to invite the deceased to execute a codicil to her will, so that the provisions contemplated in the deed which was being prepared could be carried out if the deceased died before the deed was executed. There is some conflict of evidence as to how soon after the visit of the doctor the alleged codicil was prepared and executed. The importance of that controversy lies in this fact. According to the doctor's evidence, it was expected that the injection of morphia would operate within a period of between ten and thirty minutes. The effect of it, the doctor said, would be to make the patient drowsy and to induce sleep. The doctor said that it would be difficult to say whether a patient under the influence of the drug, when once the drug had operated, would be in a condition to understand what was happening. But the operation of the drug was by way of inducing drowsiness and sleep, so that any effect on the mental faculties would be an indirect effect produced by the drowsiness, and would be gradual in its onset.

In pursuance of this plan, Miss Helen Chalcraft sent out her sister to summon two neighbours, Mrs. Ashmore and Mrs. Banks, to come as witnesses to the proposed codicil, and they were present throughout the period when the codicil was supposed to be executed. They were followed by a Mrs. Lynch—who was not a daughter but a niece of the deceased—and also by Mrs. Giles. Those two ladies were also present, as well as Miss Helen Chalcraft herself. What happened after that has been the subject of quite a degree of controversy. I have heard the evidence not only of Miss Helen Chalcraft, but also of both the attesting witnesses. I have also heard, on the other side, the evidence of Mrs. Giles and Mrs. Lynch. Having heard that evidence, I will say at once that I very much prefer the evidence given by the two attesting witnesses and Miss Helen Chalcraft to that given by Mrs. Giles and Mrs. Lynch; and where there is a conflict between the stories put forward by the witnesses on either side, I prefer and accept the evidence given by the witnesses called on behalf of the plaintiff.

In the light of that evidence, what happened in the deceased's bedroom was something like this. The deceased was lying

in bed propped up by one or more pillows. She was apparently unable to speak, in the sense of articulating the words in an intelligible way ; she was able to whisper, although it appears that what she whispered was difficult to understand. She had her eyes open at times, and appeared to be capable of seeing. Mrs. Ashmore had some doubt whether the deceased was then in a condition to recognize people. The contrary view was taken by Mrs. Banks, who said that she was fully satisfied that the deceased recognized everybody present. It appears that Mrs. Banks was standing in a position more favourable for seeing than Mrs. Ashmore was. In stating the effect of Mrs. Ashmore's evidence, I should add that she, like Mrs. Banks, expressed quite a decided view that the deceased was in possession of her faculties and fully understood what was going on. In the presence of the deceased and these ladies Miss Helen Chalcraft took a writing pad and wrote out in her own writing the words of the document now before me. It reads as follows : " 96, Osborne Road, Acton. I wish my house to " be sold and 500*l.* made over to Mr. C. F. West for purchase " of 33, Stilecroft Gardens "—Stilecroft Gardens being the new house which Mr. West was purchasing. Miss Helen Chalcraft told the deceased that if she could not speak she should nod her head ; she asked the deceased whether that was all, and whether it gave effect to her wishes. The evidence which I accept is that the deceased nodded in assent.

Nothing was said about it being a will or a codicil or a testamentary document of any sort ; but Miss Chalcraft, on being satisfied that it did represent what the deceased wished to say, held the pad on which the document was in front of the deceased with one hand, supporting the deceased with her other arm. The deceased thereupon took the pen and began to write. What she wrote was " E. Chal " ; she never completed her full name " E. Chalcraft." The signature, in fact, comes to quite an abrupt end. Following the letter " l " there is no scrawl and no mark of any kind. Immediately before the signing Miss Chalcraft had said to the deceased : " If you " cannot sign your name put a cross." The deceased, however, evidently thought that she was capable of signing her name, and obviously attempted to do so. But she did not complete it and what she wrote was accepted by those present as being the best that she could do. The document was then passed to the two attesting witnesses, both of whom were in the room, and both of whom there and then signed. They

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signed in the same room, and there is no doubt that they were physically in the presence of the deceased. What is disputed is whether at the moment when the document was attested by the two witnesses the deceased was any longer mentally present.

That, I think, is a sufficient statement of how this document came to be signed. From that time onwards the deceased was never really conscious. The solicitor came round with the completed deed later in the evening, at about six o'clock, but by then it was much too late; the deceased was completely unconscious, and she died that same evening at about half-past eight.

It seems to me on those facts, and it is conceded by Mr. Marshall-Reynolds as counsel for the plaintiff, that the onus of proof is throughout on him. This is a case where the alleged testamentary document was in fact prepared and written out by a person who was going to benefit substantially therefrom, for although Miss Helen Chalcraft is not mentioned in the document, it was contemplated by all concerned that she, as well as her mother, would be going to live with Mr. and Mrs. West. Therefore, if Mr. and Mrs. West received this welcome assistance of 500*l.* towards the purchase of their house, that would, indirectly but substantially, be of benefit to Miss Chalcraft. It is, therefore, a document prepared and written out by an interested party; and the purported execution of it is by a person who, upon any view, was in a very serious state of health, and who, upon any view, was already under the influence of a drug.

In such circumstances it is well established by authority that the onus is on the party propounding the document as a testamentary document to satisfy the court of the righteousness of the transaction, and that the deceased did really know and approve of the contents thereof. That is one matter which the plaintiff must prove to my satisfaction if she is to succeed. Secondly, the plaintiff must satisfy me that the document was intended by the deceased to be a testamentary document, and not merely a document making a disposition *inter vivos*. Thirdly, it is for the plaintiff to satisfy me that what the deceased wrote was intended to be her signature, because in this case there is no evidence that after writing what she did write the deceased was invited to signify or acknowledge, or did signify or acknowledge, that what she had written was intended as her mark. This is not a case in which there is any question whether the deceased acknowledged something

indecipherable to be her mark. I must accept what she wrote as her signature or nothing, and it is for the plaintiff to satisfy me that what the deceased wrote was intended to be her signature, and is a sufficient signature to satisfy the statutory provisions. Lastly, it seems to me, the plaintiff must satisfy me that, assuming the document was duly executed by the deceased, it was in fact attested by the witnesses in the presence of the deceased, not merely her physical presence but her mental presence. I will in a moment deal with each of those points in turn, as to each of which, I repeat, the onus is quite clearly on the plaintiff.

I am satisfied that the deceased for as long as she remained conscious always wished Mr. and Mrs. West to have 500*l*. That is not to say that she necessarily wished to execute a codicil to that effect. But it certainly was her wish that Mr. and Mrs. West should have this money, as is made clear from her own letter of December 19, 1946, coupled with the evidence of her conversation on the day of her decease with Mrs. Giles, and her anxiety to see the solicitor. Secondly, I am satisfied that there is no question as to the general mental capacity of the deceased. Right up to the last moment she remained in full possession of her faculties, well able to conduct her affairs and fully understanding everything which was going on. Up to the critical time following the second injection given to her by the doctor it is abundantly clear that the deceased was of full testamentary capacity. The real question is whether what was done was completed before the drug had time to overtake the deceased and deprive her of her mental faculties.

I will now deal with those four points which I mentioned a moment ago, on which the plaintiff must discharge the onus of proof in order to succeed. As to the first, I express myself satisfied that at the time when Miss Helen Chalcraft drafted out this document she read it over to the deceased; the deceased understood it, and approved of its contents, and acknowledged her approval by nodding her head; that is to say, at the time when she was invited to sign this document I am satisfied that the deceased knew and approved of its contents.

The next question is whether the document ever was intended to be a testamentary document, or whether, on the contrary, it was merely intended to make a disposition *inter vivos*. It has been pointed out by Mr. Tolstoy on behalf of the defendants that the document itself is in a completely equivocal

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form. The document says nothing about it being a codicil; it makes no reference to a will; nor does it refer in any way to the eventuality of death. On the other hand, I have been referred by counsel for the plaintiff to a number of cases which make it clear, first, that no particular form is necessary to constitute a testamentary document; and, secondly, that where the document itself is of an equivocal nature extrinsic evidence will be admitted to prove that it really was intended to be a testamentary document. The document itself being equivocal, what is the effect of the evidence which I have heard? As was pointed out by counsel for the defendants, Miss Helen Chalcraft's own evidence was really silent as to any intention, express or implicit, to execute a testamentary document; but it is an undoubted fact that the deceased became conscious of the seriousness of her condition, and was apprehensive lest she should die before her arrangements were all carried out. It was with that object in view that, at her request, Mr. West was sent to fetch the solicitor as soon as possible. That was followed by the conversation in which the deceased asked Mrs. Giles to see that in the event of anything happening to her—that means in the event of her death—her arrangements were carried out; that is to say, the deceased was apprehensive as to her wishes being carried out after her death.

In those circumstances, the conclusion to which I come, by way of inference from facts proved in evidence before me, is that when the deceased was invited to sign this document, and when, as I have said, she signified her knowledge and approval of its contents, she was regarding it as a document of the nature she wanted, namely, a document which would govern the disposition of her property in the event of her death before she was able to execute the deed. Putting that into other words, I feel satisfied that the correct inference to draw is that the deceased did intend this to be a testamentary document. We have, therefore, a document intended to be a testamentary document, the contents of which I am satisfied on the facts were known to and approved by the deceased, who, I am satisfied, was of full testamentary capacity up to that moment. The really difficult part of the case, in my judgment, begins now.

I come to the next point, whether what the deceased wrote can be accepted as her signature within the provisions of the Wills Act, 1837. As I have said, there is no question of it being

acknowledged as her mark. Reliance was placed by counsel for the defendants on three cases in relation to this point. He referred, first, to *In the Goods of Maddock* (1). That was a case where the signature in question was that of a witness, not of a testator, the particular witness being old and infirm. As a result he was unable to complete his signature legibly, and desisted having only written a part of his christian name, and no surname at all. It was held that, in those circumstances, that was not a proper attestation of the will.

The next case relied on by the defendants was *In the Goods of Blewitt* (2). The question there was whether initials placed alongside certain interlineations in a will were acceptable as a signature. It was held that they were. In the course of the learned President's judgment in that case he cited the language of members of the House of Lords in the earlier case of *Hindmarsh v. Charlton* (3), which, he said (4), seems "equally applicable to the testator's signature as to the witnesses' subscription." Then, quoting from the Lord Chancellor in *Hindmarsh v. Charlton* (5), he goes on: "'I will lay down 'this as to my notion of the law: that to make a valid subscription of a witness there must either be the name or 'some mark which is intended to represent the name'." In the same case Lord Chelmsford says (6): "The subscription 'must mean such a signature as is descriptive of the witness, 'whether by a mark or by initials, or by writing a name in 'full." What is said on behalf of the defendants in this case is that here you have not any of those three things; this is not a case of a mark, it is not a case of initials, and it is not a case of writing the name in full. Instead of that it is the initial followed by half the surname.

The third case to which I was referred was an Irish case, *In the Goods of Kieran, decd.* (7). That was a case in which the facts are much more similar to those of the present case. It was a case of a testator who was in bed very ill, and who tried to write his name but did not succeed in doing more than write two more or less indecipherable initials. The similarity with this case, ceases after that, because in that case a solicitor was present, and he then asked the testator whether what the testator had written could be accepted as his mark, and the testator

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(1) (1874) L. R. 3 P. & M. 169.

(2) (1880) 5 P. D. 116.

(3) (1861) 8 H. L. C. 160.

(4) 5 P. D. 116, 117.

(5) 8 H. L. C. 160, 176.

(6) Ibid. 171.

(7) [1933] I. R. 222.

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accepted what he had written as his mark ; it was so endorsed on the will by the solicitor, and was so attested by the witnesses. In that case it was decided that although the mark did not take the usual form of a cross, nevertheless it was a mark acknowledged by the testator as his own in the presence of witnesses and, therefore, sufficient to amount to a signature under the Act. But the learned judge in that case does, I think, go a little wider than was necessary for the decision of the case in giving his reasons. I think it valuable to read the last few sentences of his judgment (1). He says this : " What is the " test that I am to apply ? It is, in my opinion, whether I " am satisfied that the two scrawls were placed there by the " testator as a personal act or acknowledged as such by him, " *animo testandi*, to verify the making of the will as his own act. " If a testator cannot, or does not, sign his name, or place " legible initials on the will, but, on the other hand, places on " it or acknowledges something upon it as his mark, in my " opinion the court should not be concerned as to the particular " character or shape of the mark. It may be the time- " honoured cross, that has been referred to, or it may be some " other character. I am satisfied on the evidence here that not " only did the testator commence to make his signature *animo* " *testandi* but continued in the same state of mind until the " termination of the execution of his will, and accordingly " I admit this will to probate."

I find this a very difficult point to decide. What is said for the defendants is that if a testator sets out with the intention of signing his name, but never succeeds in completing a signature, and never develops any intention to execute the document in any other way, then it is not a signature. He can if he chooses, and if he forms the intention of doing so, execute the document by putting his initials on it ; and he can, if he wishes to do so, and forms the intention of doing so, execute a document by making his mark and acknowledging his mark in the presence of witnesses. But what is said is that if he starts out with the intention of doing any one of these things, and never departs from that intention, but yet never completes that which he sets out to do, then there can in law be no execution of the document. *In the Goods of Maddock* (2), if what was said about witnesses is to apply to testators, certainly seems to go a long way towards establishing that proposition. The Irish case to which I have referred does not

(1) [1933] I. R. 222, 229.

(2) L. R. 3 P. & M. 169.

help very much, partly because it did ultimately turn on the testator's acknowledgment of his mark, and partly because of the rather wider grounds on which the learned judge put his judgment in the last few sentences, which I have read. Indeed, if one took those last few sentences by themselves, it could be read as an authority to the contrary of what has been contended on behalf of the defendants. It seems to me that there must necessarily be some question of degree involved in this. I put in argument the case of the man who signs his name (a practice which we all know very well) by making the first few letters of his signature fairly distinct, and the last few letters of his signature completely indecipherable. Supposing, for the sake of argument, in this case the deceased instead of stopping at the "l" in "Chalcraft" had followed it by a few, or even one, indecipherable line. What would be the effect then? Would that be a completed signature? It seems to me that one ought to give a broad interpretation to the words used by the Lord Chancellor in the case of *Hindmarsh v. Charlton* (1) in the passage which I have read. There must either be the name or some mark which is intended to represent the name. It seems to me that I must have regard to all the facts of this case: the fact that this lady was in an extremely weak condition; that she was lying, if not quite on her back, very nearly on her back, in a position in which it must have been very difficult to write at all. I must ask myself the question whether on all the facts I can draw the inference that what she wrote was intended by her to be the best that she could do by way of writing her name. It seems to me that if I come to that conclusion, then I ought to accept this writing of "E. Chal" as being in law the signature of the deceased. Bearing in mind all the circumstances of the case—the weakness of the deceased, the difficulty of writing in that position—I come to the conclusion that this mark "E. Chal" on this document does amount, in all the circumstances, to a signature on the part of the deceased. I think *In the Goods of Maddock* (2) is distinguishable, because in that case there was no question of writing any surname at all; the writing stopped short at a part only of the christian name. Here we have something a good deal better than that and, in all the circumstances, I am satisfied that I ought to accept it as the signature of the deceased.

That leaves one more question for me to decide, and again

(1) 8 H. L. C. 160.

(2) L. R. 3 P. & M. 169.

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it is an extremely difficult question. Assuming that the document was duly signed, was it duly attested in the presence of the deceased? I was referred in this connexion to two cases, namely, *Right v. Price* (1), and *In the Goods of Killick* (2). Those were both cases which I think establish the proposition that a will to be valid must be attested in the presence of the deceased; and that means not only the physical presence of the deceased, but the mental presence of the deceased.

In *Right v. Price* (1) the evidence showed that the deceased had been insensible for two days at the time when the document was attested; that is to say, he had signed it, and then two days later, when he was in a state of insensibility, the witnesses, who had been present and seen the signature, proceeded to attest it. But it was held that, although they were physically in the presence of the deceased, they were not mentally in his presence, because he was in a state of insensibility. That, of course, is a much stronger case than the present one. If the deceased in this case had reached a state of insensibility, it was only by a margin of time measured in seconds, and not, as in *Right v. Price* (1), by a margin of time measured in days. But the principle clearly remains the same. If the deceased was, in fact, in a state of insensibility at the time when the document was attested, then it was not an attestation within the provisions of the Wills Act.

In the Goods of Killick (2) was a case where the deceased was ill in bed in one room, and the attestation took place with the witnesses in another room. The witnesses did not see the deceased sign. The deceased could, by raising herself in bed, have seen the witnesses sign, but there was no evidence that she did so. It was held in that case on the first ground that there was no proper execution of the will. It was not actually necessary to decide the second point, although the learned judge did express the view that the case failed on that ground also. The learned judge does say that great latitude ought to be given to the meaning of the word "presence" used in s. 9 of the Wills Act. He also says, in the words of his judgment (3): "The court has every desire to give a reasonable latitude to the

(1) (1779) 1 Doug. 241. The "ing of the statute of frauds, marginal note to this case reads: "although he be corporally
 "If a testator is in a state of "present."
 "insensibility when his will is (2) (1864) 3. Sw. & Tr. 578.
 "attested, the will is not duly (3) Ibid. 579.
 "executed according to the mean-

" exigencies of the statute There is a natural tendency
" in the mind of the court to uphold a testamentary document
" when it is clear that it was signed by the deceased with the
" intention of giving it validity "; that is to say, as I see it,
that once the court is satisfied—as I am in this case—that
the document was intended to be a testamentary document,
and was properly signed by the deceased, it will allow a
certain degree of latitude with regard to the attestation by the
witnesses. That involves some latitude in the interpretation
of what is meant by " in the presence of witnesses."

This case becomes, in these circumstances, a question of what
inference I draw from all the evidence. As I put to counsel
for the plaintiff in argument, one possible inference is
that up to the time when the deceased signed she was in a
state of good mental capacity, but that when she was half way
through the signature and broke off abruptly (as I pointed out,
the signature does break off abruptly) she was then overtaken
by something in the nature of a mental blackout, from which
she never recovered. If that were the true inference to draw
from the facts, then I think it would be clear that the subse-
quent attestation by the witnesses was not an attestation
carried out in the presence of the deceased, because on that
hypothesis she would have been in a state of mental blackout
and quite incapable of understanding what was going on.
It seems to me, however, that to draw that inference would
really be inconsistent with the evidence which I have received
from Doctor Bailey. As I understand it, the doctor expected
the effect of the drug which she had administered to be swift,
in the sense that it would be only a matter of minutes before she
expected it to operate ; but she did not, as I understand it,
expect the drug to operate in a flash, or to produce a sudden
blackout such as I have described. The process, though swift,
would be a gradual process inducing drowsiness and relief from
pain, which would in turn induce sleep on the part of the patient
—the idea being that, having got the patient asleep, she would
then sleep for the closing stages of her life and, therefore,
not be affected by the great pain. That operation, or expected
operation, of the drug seems to me to be inconsistent with a
sudden departure of the mental faculties of the deceased ;
and it seems to me that the proper inference to draw is that
throughout all these critical minutes the deceased was losing
her faculties through being overcome by drowsiness, but losing
them gradually. Having regard to the fact that the document

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was attested immediately after the deceased had written what she wrote, I think the true inference to draw from all the facts is that up to the conclusion of the attestation the deceased was still mentally present to a sufficient degree to bring the case within the Wills Act.

That is sufficient to dispose of the whole case. Although I have had no difficulty in coming to my conclusion as to which of the witnesses I accept as the most accurate and truthful, I confess that I have throughout regarded it as an extremely difficult case, and one which is very near the borderline on more than one of the disputed issues. But, for the reasons which I have given, I am satisfied that on all the points with which I have dealt the plaintiff has sufficiently discharged the onus of proof, and, therefore, I come to the conclusion that this document is a valid codicil, validly executed and attested. In those circumstances, it is my duty to pronounce in favour of both the will of July 29, 1946, and also the codicil of December 30, 1946.

Costs out of the estate.

Solicitors: *Fairchild Greig & Co.; Elliot & Macvie.*

J. B. G.

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THORY v. THORY.

Divorce — Desertion — Non-cohabitation clause in maintenance order — Deletion on appeal to Divisional Court — Effect of deletion on issue of desertion — Husband's petition on the ground of desertion.

Should the Divisional Court hold on an appeal from a decision of a court of summary jurisdiction that a non-cohabitation clause ought not to have been inserted in a maintenance order, the deletion of that clause will date as from the date of the original order, notwithstanding the fact that the appeal may have been made out of time; and the apparent existence in such a case of a non-cohabitation clause between the date of the original order and the date of its deletion by the Divisional Court will not bar the running of a period of desertion.

The parties were married in 1935. In October, 1937, the respondent wife left the husband petitioner and there was

thenceforth no resumption of cohabitation. In December, 1937, the wife filed a petition for judicial separation which was dismissed by Hodson J. in October, 1938. The wife then wrote to the husband suggesting that they should resume married life, and the husband refused the offer. In February, 1939, a court of summary jurisdiction sitting at Ramsey made an order for maintenance against the husband on the ground that he had wilfully neglected to maintain her. They dismissed a complaint that he had deserted her. In the order they inserted a non-cohabitation clause, such insertion not being per incuriam.

In February, 1947, the husband filed a petition for divorce on the ground of desertion. It was not apparently realized at that time by the petitioner's advisers that there was a non-cohabitation clause in existence. The wife respondent by her answer denied desertion and referred to the non-cohabitation clause. In April and May, 1947, applications to the court of summary jurisdiction to vary the order by deleting the non-cohabitation clause were dismissed. The petitioner appealed to the Divisional Court and the petition was amended by inserting a reference to the non-cohabitation clause and to the appeal against it. In July, 1947, the Divisional Court gave leave to appeal out of time and directed the deletion of the clause from the original order, holding that there had been no evidence to justify its inclusion.

The preliminary point was argued whether the effect of the decision of the Divisional Court was to delete the clause from the date of the appeal or to remove the clause from the date when the order was originally made, namely, February, 1939. JONES J. decided to hear the case in full.

Linton Thorp K.C. and *J. H. Jacob* for the petitioner.

S. E. Karminski K.C. and *Percy Lamb* for the respondent.

JONES J. (after stating the facts) : When these proceedings began before me I was asked by counsel to decide a preliminary point before hearing the evidence, as a decision on that point might have made it unnecessary for evidence to be called. In effect the preliminary question to be decided was as to the date when, under the order allowing the appeal against the justices' order of February 2, 1939, the non-cohabitation clause was deleted from the justices' order. Did the decision of the Divisional Court remove the clause from the justices'

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order from July 30, 1947, only, when the judgment of the Divisional Court was delivered (with the result that the clause was in operation up to July 30, 1947), or was the effect of the judgment of the Divisional Court to remove the clause from the order on February 2, 1939, the date of the original order, with the result that at no time was this clause effective?

I have been referred by counsel to several reported cases, including *Harriman v. Harriman* (1), *Mackenzie v. Mackenzie* (2), *Gatward v. Gatward* (3) and *Cohen v. Cohen* (4). The effect of those decisions appears to be that no decree based on desertion can be granted to a spouse if before the presentation of the petition the wife has obtained a maintenance order which includes a non-cohabitation clause, so long as the clause remains in the order. If, however, the clause was inserted in the order by mistake and did not form part of the justices' decision and has been deleted by order of the justices on that ground, the deletion of the clause would operate from the date of the original order as the clause must be regarded as never having been in the order.

In this case the Divisional Court have held that there was no ground for the exercise by the magistrates of their discretion to include the clause in their order and that it should be deleted from the order. Wallington J. said: "The conclusion which I reach in this case is that there was jurisdiction to make the order, that on the facts of the case there was no ground for the exercise by the magistrates of their discretion in making the order—indeed the relevant facts pointed all the other way—and that therefore this appeal ought to be allowed and that the non-cohabitation clause should be deleted from the order made by the magistrates." Willmer J. said: "... I can see no evidence which was before the magistrates such as would justify the conclusion at which they arrived, namely, that the non-cohabitation clause was necessary in order to protect the health of the complainant." Later he says: "I can see no evidence on which the magistrates could act to show that her health was ever at the material time in danger." The court ordered the clause to be deleted on those grounds.

This appears to me to be a decision that the clause ought never to have been inserted in the order, which is, I think, what Wallington J. said. Wallington J. said: "You want

(1) [1909] P. 123.

(2) [1940] P. 81.

(3) [1942] P. 97.

(4) [1947] P. 147.

"us to say that it was a nullity and never existed. If we come to that conclusion, quite clearly our decree would date from 1939. However, we have said the order was made within the power of the magistrates but, as we think, in the wrong exercise of their discretion." Mr. Linton Thorp said: "In other words, it ought never to have been made." Wallington J.: "It ought never to have been made, but it has been in force in fact for eight years, and do parties acquire rights under an order which is allowed to run for eight years?" Mr. Linton Thorp: "This matter, I think, was referred to in *Mackenzie v. Mackenzie* (1)." Mr. Lamb said that that was not so, and Wallington J. does not appear to have said any more.

The Divisional Court did not give a direction as to the date on which their order that the clause be struck out should become operative, and Mr. Linton Thorp told me that he had to be content to take the order without any decision as to the date on which the order became operative or would become operative, or as to what is the precise effect of the order.

It appears to me that, as it has been held that the clause ought never to have been inserted in the justices' order, the clause never was effective and that its deletion from the order should date from February 2, 1939, the date of the order.

I therefore decided the preliminary point in favour of the petitioner and proceeded with the hearing of the suit, but I did not deal with the possibility referred to by Wallington J. that parties might acquire rights under an order which is allowed to run for eight years. I then heard the evidence of the petitioner and of the respondent.

In the words of Lord Macmillan in *Pratt v. Pratt* (2): "what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent has without cause been in desertion. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole period."

Mr. Karminski felt bound to concede that the respondent deserted the petitioner in 1937 and continued to desert him until the suit in which she prayed for a judicial separation was ended on October 25, 1938, and I hold that that is so. Correspondence then passed between the parties and the justices endeavoured to persuade them to effect a reconciliation.

[His Lordship reviewed the correspondence and other

(1) [1940] P. 81.

(2) [1939] A. C. 417, 420.

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evidence as to the wife's alleged offers of a reconciliation, and continued:] Having seen Mrs. Thory in the witness-box and having had the case put before me so thoroughly I have come to the conclusion that she did mean to make an effort to do her duty as a wife if he would take her back and, that being so, I think it was a genuine, honest offer on her part to effect a reconciliation and to try to restore this marriage which so unfortunately had broken down. I do not know that it is really a consideration to which I should pay any attention, but I have considered whether her former conduct was such as to make it unreasonable to expect the petitioner to take her back. I know of no authority which says that that would be good ground upon which he could refuse to take her back, but it might not be reasonable if a spouse had behaved in a very outrageous way that the injured spouse should be asked to take that spouse back. In this case she charged him with cruelty and she failed to substantiate her charge. That is a serious matter, and that behaviour on her part undoubtedly made it difficult for him to take her back in the year 1939, and it has been pointed out that it would be difficult for him to take her back because the matter was present in his mind. Mr. Linton Thorp asked me to read the judgment of Hodson J. in the judicial separation case, and I have done so, but I do not think there is anything there which suggests that her conduct was so outrageous that it would be completely unreasonable to expect the petitioner to take her back. In my view it was not of that character; it was not of such a character as to make it impossible or unreasonable for him to take her back, or unreasonable to expect him to take her back. Consequently I hold he was not justified in rejecting her genuine, honest offer to return. I believe that if he had allowed her to return she would have returned to him in 1939, and that, consequently, she did not desert him since then.

Solicitors: *Hampton Vick, for Sidney J. Peters, Cambridge; Vizard, Oldham, Crowder & Cash, for Wild & Hewitson, Cambridge.*

J. B. G.

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C. A.

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Divorce — Adultery — Condonation — Husband on active service abroad—Wife's confession of adultery—Husband's letters of forgiveness.

Tucker,
Bucknill and
Cohen L.JJ.

Mere words of forgiveness cannot by themselves constitute condonation of adultery. Where a wife has committed adultery, condonation can only be proved by conduct on the part of the husband having the effect of reinstating the wife in her former position as a wife.

A husband, while on active military service overseas, received a letter from his wife confessing to being pregnant by another man. The husband replied by writing letters expressing forgiveness of and continued affection for his wife. He took an interest in the child after its birth. He did not stop the wife's marriage allowance, and she drew the ante-natal allowance. The husband maintained that attitude for some months. Then, having received letters from three persons unknown to him, which, confirming statements made to him by members of his family, informed him that his wife was associating with men, he wrote to her saying that he was now convinced that she had not told him the whole truth and that, although he still loved her, he proposed to divorce her. The wife wrote back telling him to proceed with the divorce, and he thereupon stopped her marriage allowance, and took proceedings for dissolution. At the trial of the petition, he admitted in evidence that he had freely forgiven his wife, and that he would have been content to return to her but for the letters which he received about her. The commissioner dismissed the petition on the ground of condonation. On appeal by the husband,

Held, that, as the husband had never renounced his wife, but had, at the highest, merely allowed her¹ to remain in the position in which she had been before her confession, and as, moreover, there was at the material time no conjugal cohabitation which could be interrupted and resumed, his conduct after receiving the confession did not amount to the reinstatement of his wife necessary to constitute condonation; and that, as his letters of forgiveness could not by themselves amount to condonation, he was entitled to a decree.

Keats v. Keats (1859) 1 Sw. & Tr. 334 and *Crocker v. Crocker* [1921] P. 25 discussed.

APPEAL from Judge Willes sitting as a Divorce Commissioner.

The facts were stated by BUCKNILL L.J., substantially in the following terms: The appellant, Leslie Fearn, and the respondent, Maisie Irene Fearn, his wife, were married in

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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November, 1940. The husband at the time of the marriage was in the army. Their matrimonial home was at 20, Ashby Street, Derby, a house which the husband rented and where he spent his leaves with his wife. In August, 1941, he was ordered abroad, and he did not return to this country until September, 1945. Husband and wife corresponded with each other, but on or about June 14, 1944, the husband, who was then serving in Italy, received a very unwelcome letter from his wife. Unfortunately all the relevant letters from the wife to the husband were lost in action, and it was only possible to ascertain their contents from his recollection and from his answers to them. The wife in the letter said that she had made a terrible mistake and did not know what to say about it, that she had been with a man, and was expecting a baby. She said that she had been friends with the man for some time, but did not mention his name, that she was at a party and had two or three drinks, and hence the trouble.

In reply the husband wrote on June 14 to the wife that he would always love her, and stated: "I think the world of you" and always will. Now, I don't know how things stand with "you, you say you were going with the fellow for quite a" while, if you think anything of him I won't stand in your way, "the Army will get me a divorce. The letter you sent me" pointed that way to me." The letter ended: "Your ever" loving husband for as long as you wish." On June 20 the husband, in reply to another letter from the wife dated June 12, again wrote to her and said: "Well, I have forgiven you, "darling : . . . Well, I love you, and I hope you love me" just as much. This has got to be lived down and it can be. "That relays (sic) on you."

A number of letters were written in a similar strain by the husband to the wife. In one he said: "I love you and I was" glad to know you still love me. Stick to that promise you've" made me be good and don't go out with girl friends, it will" help me a lot liking kiddies as I do and as far as anybody else" is concerned, it will be my own and I'll treat it as such." On August 20 the husband received a letter from his mother saying that his wife had had a baby girl. He then wrote to his wife saying: "I'm really glad of that, that's just what I was" hoping for." On August 22 the husband sent a present of some lace, and ended, "give Julie (the baby) a big kiss for me. "Take care of yourself. I love you. Your ever loving husband" always for ever." In a later letter he wrote "Darling you

" say I'll never have cause to doubt you again. I want us to
 " be happy, and we can be you and I because its in us both and
 " if you stick to that we will be." On September 2 he wrote
 again, and in the letter said : " By the way did you get that
 " insurance business fixed up. I hope so Anyway
 " my sweet it won't be long before I'm seeing you now.
 " That'll be the day. I must close now darling, take care of
 " yourself and baby too."

Meanwhile the wife had obtained, before the birth of the
 baby, a pre-natal allowance, a fact, apparently, that the
 husband knew about ; and she continued to draw her separation
 allowance. In September the husband had been receiving
 letters hostile to the wife from his family. Thus, in a letter
 to his wife he wrote : " The family seem to be kicking, you
 " seem to have got in bad books, as long as your not in bad
 " books with me, don't worry." In a later letter he wrote to
 the wife saying : " I love you. Now what's this talk about
 " *if* I come back to you, there's no *if* about it. Arnold seems
 " to be set on getting me a divorce. I think he'll find I've
 " something to say about that. They seem to think I've got a
 " bad girl. Well, I don't, and its up to you to prove them
 " wrong. In the meantime have nothing to do with them.
 " I'll write to Mother and have a stop put to it—I'm glad you
 " still love me darling it would have broken my heart if you
 " had not. You'll never know how upset I was thinking of that
 " because I made sure you'd think a lot of the fellow."

On about September 22 the husband's attitude towards his
 wife changed in consequence of letters from his mother and
 some strangers. The change was shown in the following letter
 from him to his wife : " Darling, I've received three letter
 " cards from you the last one Sept. 12. Now I've had some
 " letters from Mother and Flo telling me you've been going
 " about with fellows for I don't know how long and they
 " expected to happen what did happen, but this is the worst.
 " I've also had three letters from three people I've never
 " heard of telling me how you've been carrying on. Now as you
 " know I was going to overlook the family, but I can't these.
 " It seems you've more to tell me or should have told than you
 " have. I don't know the people myself and their advice is for
 " me to get a divorce. Now all these people can't be running
 " you down just because they don't like you. They must
 " know something you haven't told me. Now this has got me
 " down for people I don't know to write me like they have.

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" I took your word that it was just a mistake, and that it was a fellow you just got to know but it seems you weren't telling me the truth. This has made me unhappy because I think a lot about you, you must know that, but I'm afraid it leaves me with one view that is to get a divorce. I guess this is going to be a shock to you after me saying I'll come back to you which I fully intended doing, but I believe there was more to tell me than you did. Up to this I believe I'd be more faith in you than anything in this world, even after what happened, but its gone in three letters which I could not put to one side and say its not true. I wanted to be the last person to hurt you, you've been hurt enough and I guess I'm as upset writing it as you will be reading it. I wish you'd have told me what you should. Love, Les."

The wife's answer to the husband was that he could go ahead and get a divorce, and from that time onwards the correspondence between them ceased. The husband took the necessary steps to have the wife and child's allowance stopped, saw his commanding officer, and obtained a poor person's certificate for a divorce petition on June 18, 1946. In cross-examination he admitted that, until he received these last letters, he was perfectly content to go back to his wife, having freely forgiven her.

The mother of the husband was called, and, after proving the birth of the baby, said that " There was one man she [the wife] carried on months and months with. I should think that that was the father of the child." She added that she wrote to her son telling him that the right thing was to get a divorce and let the man keep the child.

The wife, also, was called as a witness. She alleged that she met a man in about August, 1943, took too much to drink, and committed adultery with him. She received the ante-natal allowance in July, 1944, and the child was born on August 12, 1944. Her own allowance continued until October, 1945, and the allowance for the child till April, 1945. She was asked this question: " And this other man, when you received your husband's forgiveness what did you do about it? (A.) I was sure my husband would forgive me. He had already gone." The wife declined to tell the court the name of the man with whom she had committed adultery.

The commissioner, after stating that the mere expression of forgiveness does not constitute condonation in law, even when the forgiveness is in writing and is sent and accepted by the

wife, came to the conclusion that the husband restored the wife to her former position because he also saw his commanding officer and other persons interested in his welfare, told them he had forgiven his wife, and received and acted upon advice to make the pre-natal allowance to his wife and to provide for the child as his own child. He therefore dismissed the petition. The husband appealed.

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Vaughan K.C. and *Hyamson* for the husband. Apart from the consideration that there was no evidence to justify the commissioner's finding that the husband had taken any particular step to continue the payment to the wife of her allowances after his receipt of her confession, for example, that he had decided not to stop them after taking the advice of his commanding officer, no finding of condonation can in any event be based on the continuation of the allowances. No special significance attaches to the continuation of the ante-natal allowance, because he could not be expected publicly to expose or disown his wife. He could not stop the one allowance without stopping the other, and no distinction is to be drawn between them for this purpose.

The authorities show that an essential ingredient of condonation is a restoration of the wife to the position of wife from which she has been degraded by reason of her adultery. Nothing that this husband did after receiving his wife's confession amounted to such a restoration. Mere words of forgiveness cannot constitute condonation because they cannot effect the necessary restoration. Nothing in this husband's conduct after receiving his wife's confession amounted to condonation, if only because of the fact that, owing to his absence from home at all material times, the wife never suffered any loss of position to which she could be restored. [*Keats v. Keats* (1) and *Crocker v. Crocker* (2) referred to.]

Raeburn K.C. and *Alfred Stone* for the wife. The basis of the doctrine of reinstatement is not that the husband has desired to show publicly his forgiveness of his wife, for a single act of marital intercourse, with knowledge in the husband of the wife's adultery, is enough to constitute condonation, and that is, of course, a private act of reinstatement. The doctrine of reinstatement would appear to have arisen thus: in normal times and circumstances a wife who has committed adultery will not ordinarily be living at home with her husband once her

(1) (1859) 1 Sw. & Tr. 334.

(2) [1921] P. 25.

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adultery is known to him. Either she will have been expelled from the matrimonial home or he will have left it. Discovery of adultery also very often takes place when spouses are already living apart. The discovery involves a degradation of the wife's position and a blot upon her which cannot be expunged unless and until the husband indicates his intention to expunge it. That is what reinstatement of the wife means. If she is outside the matrimonial home and he recalls her to it, that may be an obvious form of reinstatement. It is conclusive evidence of a desire to restore her to her position. On the authorities, the real basis of condonation is the intention to forgive, and that is a matter of evidence. In all the cases where the court has hesitated to declare as condonation an expression of intention by the injured spouse by the spoken or the written word, unaccompanied by any other act, it has been because the court has found insufficient indication of the intention to forgive as a matter of evidence. Circumstances like those of this case have not come before the court before. This wife has never been deposed from her position as a wife. As soon as he heard of the adultery, the husband wrote letters of forgiveness. The fact of his acquiescing in continued payment of the allowances is consistent with the absence of any degradation. There was no possibility of restoring the wife to a position of which she had never been deprived. Within the limits imposed by circumstances this husband's intention to return to cohabitation with his wife was shown to be absolute. Only one factor destroyed that clearly manifested intention—the three letters from strangers.

[BUCKNILL L.J. Is not the test that there has been a complete blotting out of the offence?]

It is all a question of evidence. There has so far been no case in which the kind of expression of forgiveness in words, apart from acts, which exists here has been held, as a matter of evidence, to be enough to indicate a complete blotting out of the offence. Here no act apart from words was open to the husband. There was nothing more that he could do to reinstate his wife, for in the circumstances there had been no loss of position to her. He did every possible thing at once to indicate complete forgiveness. He at once wrote affectionate and forgiving letters, expressed the desire to resume marital intercourse as soon as possible, and refrained from stopping the allowances which she received as his wife. It was open to him to stop those allowances temporarily only, if he had wished.

He had that opportunity of degrading his wife, but he did not take it. He never did anything contrary to his expressed intention to preserve her in her position as a wife. The husband's absence from home on military service and the wife's consequent remaining at all material times in the matrimonial home place this case in a class apart from others in which mere words of forgiveness may have been held to provide inadequate evidence of reinstatement. [*Keats v. Keats* (1) referred to.]

[COHEN L.J. Can it not be said that, owing to the war, there is no matrimonial home here and that, therefore, there can be no condonation until the husband returns home?]

To say that would make things very difficult for any husband in this position who wants to condone his wife's adultery.

[COHEN L.J. He can do all that is immediately open to him during his absence; but it would seem that he cannot effect complete condonation until he returns.]

The husband could have written back to his wife renouncing her. He could have ceased writing to her altogether. He could have insisted on her getting the child adopted. All those steps were open to him, quite apart from any stopping of the allowances, but he took none of them. His so refraining is surely a strong reinforcement of his words of forgiveness as a matter of evidence. These regular, loving letters written after receipt of the confession, are, moreover, more than mere words of forgiveness: they are in themselves an overt act constituting forgiveness. They express a deep affection for the wife coupled with desire for immediate resumption of marital intercourse. He displayed by every means open to him, including expression of a desire to take the illegitimate child into his own home, the wish to be reconciled with his wife.

The fact that there was no outward loss of position to which the wife could be reinstated distinguishes this case from all the others in the books. No public act of reinstatement was possible. In any event the public aspect of reinstatement can hardly be an essential element, since one, necessarily secret, act of sexual intercourse has been held to constitute condonation. It was in any event not a mere case of forgiveness by words, for the letters were accompanied by negative and positive acts of forgiveness, the latter including the sending of presents and the expression of intention by the husband to treat the child as his own. This appears to be the first case where a wife, at the time of being forgiven, finds herself without any loss of position through her adultery.

(1) (1859) 1 Sw. & Tr. 334.

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Vaughan K.C. in reply. For ninety years this matter has rested on Lord Chelmsford's pronouncement in *Keats v. Keats* (1) that mere words of forgiveness, however strong, can never be enough. The fallacy in the argument for the wife is in regarding condonation as a thing to be evidenced by forgiveness. It is a quite separate matter. What is required to constitute condonation is, as shown by *Keats v. Keats* (1) and *Crocker v. Crocker* (2), some independent and overt act constituting reconciliation or reinstatement. The position must be accepted that in unusual circumstances, of which those of this case are an example, it is impossible for a husband to condone his wife's adultery in the eyes of the law. If a wife has been overtly degraded, condonation must consist in the undoing of the degradation. If she has not been degraded, as here, the time for condonation is postponed until the husband returns home and announces his intention of resuming cohabitation. An independent act, apart from the expression of intention, however strong, to condone, is necessary to deprive the husband of his right to sue for divorce once his wife has committed adultery. Here there was no opportunity for the husband to give effect by any independent act to his expressions of intention.

[COHEN L.J. He intimated that he would treat the illegitimate child as his own.]

That, again, was a mere expression of intention. What this husband did, apart from anything said in letters, cannot amount to condonation. It would be unsafe to treat as condonation anything which he wrote in the circumstances. His only positive act was to continue the allowances.

[BUCKNILL L.J. We have to consider the wife's point of view, too. She might have been prevented by the tenor of her husband's letters from taking proceedings against the father of her child.]

If the wife had in fact worsened her position in consequence of anything said by her husband, that situation might require consideration in the light of Lord Sterndale's observations in *Crocker v. Crocker* (2). That does not, however, arise on the facts of this case.

Cur. adv. vult.

February 26. BUCKNILL L.J. read the following judgment. [He stated the facts as above set out, and continued :] I do

(1) 1 Sw. & Tr. 334, 356.

(2) [1921] P. 25.

not find in the transcript any evidence by the husband that he acted in the way stated by the commissioner. He merely took no steps to stop his wife's separation or pre-natal allowance or the allowance for the baby until about a month after the birth.

In my opinion, the question whether the conduct of the husband in this case amounts to condonation is difficult to answer. The leading case of *Keats v. Keats* (1), is based on facts wholly different from the facts in this case, but, as Lord Sterndale M.R., said in *Crocker v. Crocker* (2), the definition of condonation there given was quite general in its terms and "was not in any way dependent upon the actual facts of the 'particular case.'" Lord Sterndale M.R., also said, during the argument (3), that *Keats v. Keats* (1) "is not binding upon us ; " but it is sixty years old and has constantly been acted upon "in this court."

In *Keats v. Keats* (1) the Judge Ordinary, when addressing the jury on the meaning of condonation, said (4) : "I have not " been able to find in the reports of cases decided in the " Ecclesiastical Courts, any precise definition of what was meant " in those courts by the word 'condonation' ; but looking to " the circumstances under which former judges have held " condonation to have been established, I have come to the " conclusion that condonation means a 'blotting out of the " 'offence imputed, so as to restore the offending party to the " 'same position he or she occupied before the offence was " 'committed.' This is the best definition that I can give you " of the term of condonation." In *Keats v. Keats* (1) the issues were directed to be tried before the Judge Ordinary and a special jury, but the question whether there should be a decree came before the full court.

This court was composed of the Lord Chancellor (Lord Chelmsford), Wightman J. and the Judge Ordinary. Lord Chelmsford in his judgment said that the court was called upon to decide whether the Judge Ordinary's definition of condonation was correct, and whether it was to be adopted as the principle upon which all similar cases were to be decided for the future. Lord Chelmsford said (5) that "the second part " of the proposition, as stated by the learned judge, explains " as well as restricts the first part. It must be such a blotting

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[(1) 1 Sw. & Tr. 334, 356.

(4) 1 Sw. & Tr. 346.

(2) [1921] P. 25, 34.

(5) Ibid. 354.

(3) Ibid. 33, 34.

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“ out of the offence as restores the wife to her former position.
 “ This is contended to be incorrect, because it excludes a
 “ condonation by words only ; for it is said there are two sorts
 “ of condonation, one express or by words only ; the other
 “ implied, as by taking back a delinquent wife and cohabiting
 “ with her. On the other hand, the distinction in the law of
 “ condonation is denied, and it is asserted that no condonation
 “ by words only, however strong, will be sufficient, unless they
 “ are followed by sexual intercourse.”

Lord Chelmsford's conclusion upon that assertion was as follows (1) : “ The acts which prove forgiveness may be so
 “ strong and unequivocal, as by taking home an offending wife
 “ and cohabiting with her, that they may conclusively establish
 “ condonation. But words, however strong, can at the highest
 “ only be regarded as imperfect forgiveness, and, unless followed
 “ up by a something which amounts to a reconciliation and of a
 “ reinstatement of the wife in the condition she was in before
 “ she transgressed, it must remain incomplete It is
 “ obvious, without adducing instances to illustrate my
 “ meaning, that that in some cases may be a test wholly
 “ inapplicable. But I am willing to adopt an expression which
 “ was happily used by Wightman J., in the course of the
 “ argument, and to say that in my judgment there can be no
 “ condonation which is not followed by ‘ conjugal cohabitation ’
 “ To say that condonation requires conjugal cohabi-
 “ tation or connubial intercourse, leaves the nature of the
 “ cohabitation or intercourse to be adapted to the varying
 “ condition and circumstances of different parties. This will
 “ also justify the language of the learned Judge Ordinary, that
 “ the forgiveness must be shown by a restoration of the wife to
 “ her former position I see no reason at all to differ
 “ with the Judge Ordinary in the way in which he has stated
 “ the law of condonation to the jury ; but with him I think
 “ that the forgiveness which is to take away the husband's
 “ right to a divorce must not fall short of reconciliation, and
 “ that this must be shown by the reinstatement of the wife in
 “ her former position, which renders proof of conjugal co-
 “ habitation, or the restitution of conjugal rights, necessary.”

The crucial question, therefore, in the present case is this :
 did the conduct of the husband, after his hearing of the wife's
 adultery, amount to a reinstatement of the wife in her former
 position ? Did it amount to conjugal cohabitation or the

restitution of conjugal rights, so far as it was possible for a husband who is fighting in Italy to be in a state of conjugal cohabitation with his wife in England?

The decision in *Keats v. Keats* (1) was approved and followed by the Court of Appeal in *Crocker v. Crocker* (2). The material facts in that case were these: The husband was a soldier on active service. While he was away his wife committed adultery with the result that she had a child of which he was not the father. The husband on first hearing of the wife's adultery took the children of the marriage away from her, and stopped her allowance. He then wrote a letter to his wife in which he said that he was willing not only to forgive her and to take her back again, but that he was even willing to take charge of her illegitimate child. He then received certain letters from his relations, and he wrote another letter to her in which he refused to have anything more to do with her. On these facts Lord Sterndale M.R., said (3): "It is said that upon those letters there is condonation; but in my opinion they do not constitute condonation at all. The husband is there expressing his willingness to take his wife back . . . but the children were never brought back to her; the allowance and the allotment of payment were never restored to her; and she certainly was not, and could not by those letters alone be restored to her former position. I do not think it is necessary for me, any more than the Judge Ordinary in *Keats v. Keats* (1) thought it was necessary for him, to say whether the mind of man could possibly devise a form of reconciliation in words which would restore a guilty spouse to his or her former position; it is difficult to imagine, but it is quite enough to say that, in my opinion, those letters do nothing of the kind. The wife was not in any way restored to her position."

The facts in that case, therefore, differed vitally from the facts in the present case, in that in the present case the husband took no steps to renounce his wife by stopping her marriage allowance. There was in the present case no loss of position as a wife to which she could be reinstated; nothing had been taken away from her by her husband which he could restore for the purpose of reinstating her as his wife.

The case seems to me to raise two questions. The first question seems to be partly one of fact, and is whether the

(1) 1 Sw. & Tr. 334.

(3) Ibid. 36.

(2) [1921] P. 25.

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conduct of the husband amounted to a restoration of the wife to her former position as a wife; whether there was a resumption or continuance of "conjugal cohabitation." In my view, the husband did nothing which amounted to a restoration of the wife to her former position, and there was no conjugal cohabitation at the time. At the highest, the husband merely allowed the wife to remain in the position in which she had been before her confession, and took no steps to depose her from that position.

The second point is a question of law, and one which was not decided in *Keats v. Keats* (1) or *Crocker v. Crocker* (2). It is whether formal words of forgiveness can by themselves constitute condonation. Lord Sterndale M.R., glanced at the point, in the passage which I have quoted from his judgment in *Crocker v. Crocker* (2), with a somewhat doubtful eye. A husband can make a valid agreement with his wife not to take divorce proceedings in respect of her confessed adultery. Thus, in *Rose v. Rose* (3) a husband and wife entered into a deed of separation by which it was agreed that every offence, if any, committed by either party against the other should be considered as condoned. It was held by the Court of Appeal, affirming the decision of the President, that adultery by the husband subsequent to the deed did not revive acts of cruelty committed by him before the deed. Sir George Jessel M.R., in the course of his judgment said (4): "It appears to me "to be perfectly consistent with public policy to hold that there "may be what, for want of a better term, I will call final "condonation. In the old Ecclesiastical Courts condonation was "never final, but I do not see that public policy is against "final condonation, indeed I think that it is in favour of "allowing it. That bygones should be bygones is as "advantageous between husband and wife as between any "other parties." There is, however, no such agreement in the present case. There are merely the plain words of complete forgiveness.

The importance of reinstatement and the comparative irrelevance of forgiveness as an essential feature of condonation are illustrated by *Cramp v. Cramp* (5). In that case the facts were similar to those in *Crocker v. Crocker* (2) except that the husband never forgave the wife and the wife admitted

(1) 1 Sw. & Tr. 334.

(2) [1921] P. 25.

(3) (1883) 8 P. D. 98.

(4) Ibid. 99.

(5) [1920] P. 158.

that she never thought her husband had forgiven her, and never asked to be forgiven. On the other hand, the husband had intercourse with his wife on several occasions after knowledge that she had committed adultery. The husband subsequently petitioned for a decree on the ground of his wife's adultery, but McCardie J., held that his right was barred by his condonation of the offence.

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McCardie J., in the course of his judgment, said that no matrimonial offence is erased by condonation: it is obscured but not obliterated, and may be revived after many years. From this feature of legal condonation he drew the inference that (1) "the truer definition of condonation is that it is a conditional waiver of the right of the injured spouse to take matrimonial proceedings, and it is not forgiveness at all in the ordinary sense." Later, he said (2) "Condonation is not conditional forgiveness, but a conditional reinstatement of the offending spouse" adding (3) "A man cannot at the same moment exercise the rights of a husband and disclaim the continuance of the marriage bond . . . a husband, who has sexual relations with his wife after knowledge of her adultery, must be conclusively presumed to have condoned her offence."

In the absence of any clear authority one may speculate as to the principle underlying the doctrine of condonation in order to see whether that throws any light on what the law should be on the question whether mere words of forgiveness, oral or written, can ever constitute legal condonation.

In this connexion it is important to note the great weight which the legislature attaches to the principle of condonation. It is an absolute bar to a decree of divorce; it is not a discretionary bar, as is the cruelty or the adultery of the petitioner or unreasonable delay in presenting the petition. It being, therefore, an absolute bar, I think it reasonable to assume that the law requires a high degree of proof that the innocent husband has not only intended to waive the offence, but has manifested that intention by restoring the guilty wife to her former position. I think it is a corollary to that requirement that in a case like the present the wife should have been removed from her position as a wife before she can be restored to it.

The other principle which, I think, may be considered when

(1) [1920] P. 163.

(3) Ibid. 171.

(2) Ibid. 169.

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deciding whether mere words can ever constitute condonation is that the innocent husband, after knowledge of the adultery, must not behave in such a way as seriously to prejudice the guilty wife. Sexual intercourse is an extreme illustration of such prejudice. Such behaviour by an innocent spouse may be regarded as condonation of the offence. One finds a similar principle in certain statutory limitations placed on the right of a petitioner to avoid his marriage under s. 7 of the Matrimonial Causes Act, 1937. In the present case I cannot see any evidence that the wife has been prejudiced by the conduct of the husband after hearing of her adultery.

If one considers what is in the interest of the community with regard to the kind of proof required to establish condonation, it seems to me, on the whole, that, while it is in the interest of the community that matrimonial bygones should be bygones, it would create great difficulties and injustice if mere words of forgiveness were to be accepted as proof of condonation. For instance, in the present case the husband wrote the letters of forgiveness to his wife at a time when he had only her statements before him as to the details of her misconduct and was himself living under conditions of danger on active service which made it difficult for him to come to a rational and considered decision about what he should do. To hold that his letters to her thereby debarred him from exercising his right to a decree on the ground of the adultery of the wife seems to me harsh and unreasonable.

These reasons lead me to the conclusion that the law insists, and rightly insists, upon conduct showing reinstatement by the husband of the wife as proof of condonation. In the particular circumstances of this case there has been, in my view, no reinstatement of the wife, because the husband did not at any time renounce her, and there was no broken "conjugal cohabitation" which was restored.

I think, therefore, that in this case there was no sufficient proof of condonation, and that the husband is entitled as of right to a decree on the ground of his wife's adultery.

TUCKER L.J. In arriving at his decision that the husband had condoned his wife's adultery, the commissioner was mistaken as to the effect of some of the evidence. He says that the husband "went and saw his commanding officer" and other persons interested in the welfare and troubles of "our service men, and as a result of the perfectly proper and

“ sound advice that he got in face of his own attitude to the
 “ girl he loved which is clearly shown in the letters that he
 “ wrote—in face of that attitude he was perfectly properly
 “ advised to make the allowance to the wife which the girl
 “ needed as an expectant mother and treat her as the mother
 “ of a lawful child, to get her the pre-natal allowance and after
 “ the birth of the child to provide for the child as his own child
 “ and the girl as still his wife.” Later he speaks of the husband
 as having “ secured for her ” these allowances. This was not
 in accordance with the evidence. No evidence was given of
 the steps which have to be taken before a pre-natal allowance
 is granted, for example, whether any application or
 authorization on the part of the husband is required. The
 dates would make it appear probable that the pre-natal
 allowance was obtained on the application of the wife alone.
 Furthermore, the husband did not seek to obtain the advice
 of his commanding officer or anyone else until September when,
 as a result of the advice obtained, he stopped the allowances.
 It does, however, appear from the evidence, although the matter
 was not very fully explored, that the husband was aware that
 his wife was receiving these allowances and took no step to stop
 them until September. The question for decision is accordingly
 whether the husband’s letters of forgiveness coupled with his
 failure from June to September to stop the allowances amount
 to condonation.

I think that the authorities referred to by Bucknill L.J.
 establish that words of forgiveness cannot of themselves
 amount to condonation. In the present case there is nothing
 beyond words of forgiveness, unless the mere failure to stop
 the allowances for a period of four months during which the
 husband was engaged on active service overseas can be regarded
 as an unequivocal act of recognition amounting notionally to
 conjugal cohabitation. I do not think it can be so regarded.
 It may be asked : what more could the husband have done to
 reinstate his wife in the position from which she had deposed
 herself? The answer may be that the circumstances of the
 husband’s absence on active service rendered it impracticable
 for him completely to condone his wife’s adultery until he had
 returned to this country and was in a position to take stock
 of the situation before taking an irrevocable step. I do not
 suggest that circumstances may not exist in which a petitioner
 absent overseas may take some irrevocable step which will
 convert his words of forgiveness into condonation. It is.

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C. A. sufficient to say that I can find no evidence of such a step having
 1948 been taken in the present case in the four months during which
 --- the husband was engaged in actual front-line active service
 FEARN and had had only his wife's version of her conduct. To hold
 v. that in such circumstances the husband had condoned his wife's
 FEARN adultery would, in my view, be equivalent to deciding that
 --- mere words of forgiveness, given perhaps hastily and without
 Tucker L.J. full knowledge of the facts, are sufficient to constitute con-
 donation.

For these reasons I agree that this appeal succeeds.

COHEN L.J. I have had the opportunity of reading the judgments which have been delivered by my Brethren, and I do not desire to add any reasons of my own for agreeing that this appeal should be allowed.

Appeal allowed.

Solicitor for the husband : *N. Ashton Hill, Services' Divorce Department, the Law Society.*

Solicitors for the wife : *Boxall & Boxall, for J. Robert Pinder & Son, Derby.*

1948

Mar. 17.

Pilcher J.

IN THE GOODS OF ARTHUR DOWDS, PRESUMED DECEASED.

Probate — Practice — Presumption of death — Foreign declaration of death—Grant by foreign court—Registrar's decision to make grant or refer application to judge.

Where there has been a declaration of presumption of death by a competent court of the domicile of a presumed deceased followed by an order of a like court of that country vesting the estate of the presumed deceased in the persons entitled thereto, the registrar in England has power to make the necessary grant although he may consider it necessary in certain cases to refer the matter to the judge.

In the Goods of Schulhof, ante p. 66 followed.

MOTION for leave to swear the death.

On March 28, 1947, an order was made by the High Court of Eire whereby the widow of the deceased was granted liberty to apply for a grant of probate of the last will of Arthur Dowds, and to swear in her affidavit made for the purpose of obtaining such grant that to the best of her information and belief the

deceased had died on or since November 20, 1946. Therefore probate was granted by the High Court of Eire on December 24, 1947. The deceased died domiciled in Eire but left certain personal property in England.

In view of the decision in *In the Goods of Schulhof* (1), application was made to the registrar for the purpose of obtaining a grant in respect of the English property, on the footing that there was already a declaration of death by a competent court of the domicile of the deceased followed by an order of the like court of that country vesting the estate of the presumed deceased in the persons entitled thereto. The registrar refused to make the grant. The case therefore came before the court on motion.

John Symms for the applicant.

PILCHER J. accepted the declaration and order of the Irish court without further inquiry, and added that in his opinion the registrar had power to make a grant in such a case, i.e., where there had been a declaration of presumption of death by a competent court of the domicile followed by a vesting order of the like court of that country. *In the Goods of Schulhof* (1) was sufficient authority for this power. The registrar must however have a discretion to refer such cases to a judge; for circumstances might exist in a foreign country which might cause doubts to be felt as to the trustworthiness of the evidence.

Solicitors: *Attenboroughs*.

(1) Ante p. 66.

J. B. G.

BARNACLE *v.* BARNACLE (KING'S PROCTOR SHOWING CAUSE).

1948

Feb. 4.

Wallington J.

Divorce—Petitioner's adultery undisclosed to court—Duty of solicitors—Clarity of language.

A solicitor is bound, not only in conscience but in law, as an officer of the court, to leave out nothing that ought to go into a discretion statement; and the greatest care should be taken by a solicitor, or his clerk, so to speak to the petitioner about these

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matters as to put beyond the bounds of possibility any misunderstanding as to the nature of the questions asked. Should a doubt arise in an intervention by the King's Proctor as to what was said by a solicitor to his client, the solicitor will if he gives evidence be a witness of the court, and as such subject to cross-examination by both parties.

The petitioner contended upon the intervention that the managing clerk, T., of the solicitors whom she consulted about her divorce never made clear to her that she must not herself commit adultery and did not tell her what adultery was. She said that she believed, throughout, that adultery was the having of a child by a person other than her husband. She said that she did not know about the need for disclosure of her own conduct. These contentions having been advanced by her the King's Proctor's counsel informed the judge that T. was in court and desired an opportunity to give evidence in rebuttal, on the grounds that the petitioner had by her evidence waived privilege. T. was not tendered as a witness of the King's Proctor and was in fact called as a witness of the court, the judge saying that he felt T. should give evidence if he desired to do so (a) in order to deal with the charges made against him and (b) in order to assist the court on the issues. T. was called and examined by the judge, and was cross-examined by counsel for the King's Proctor and counsel for the petitioner.

In February, 1946, a wife petitioner signed her petition for divorce on the ground of adultery. The petition was filed and on March 31, 1947, a decree nisi was pronounced in her favour. The King's Proctor intervened in May, 1947, on the ground of the petitioner's undisclosed adultery, which was alleged to have been committed after the presentation of the petition. It was further alleged that at the time that the case was heard she was in fact living and committing adultery with the man concerned. By her answer to the plea of the King's Proctor the petitioner admitted the adultery, but denied that she had presented a false case and denied that the decree had been obtained by reason of such false case. The court was told that the petitioner had not understood the necessity to disclose her own adultery, for although her solicitor had questioned her about her conduct, he had used equivocal language which had not been fully understood and had not made clear to her that she must not commit adultery herself. It was also said that the petitioner understood that adultery meant illicit sexual connexion between two unmarried persons with the consequent production of a child, and that without a child there could be no adultery. The respondent had, in fact, had a child as a result of the adultery alleged in the petition.

These matters having been put in evidence at the trial,

counsel for the King's Proctor informed the judge that T. (the managing clerk of the solicitor who had dealt with the petitioner's case up to the granting of the decree nisi, but was not acting for her in the present proceedings) was in court and desired an opportunity to give evidence in rebuttal, on the ground that the petitioner had waived privilege by her evidence. The court held that T. should be called as a witness of the court, the judge saying that he felt that T. should give evidence if he so desired (*a*) in order to deal with the charges made against him, and (*b*) in order to assist the court on the issues. T. went into the witness box and was examined by the judge; he was then cross-examined both by counsel for the King's Proctor and by counsel for the petitioner.

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James Comyn for the King's Proctor.
Vernon Plummer for petitioner.

WALLINGTON J., after referring to the petitioner's explanation that she had not understood either the real purport of T.'s questions, or the necessity to avoid committing adultery herself, or, in any event the real meaning of the word "adultery," and observing that the gravity of the case could not be over-estimated, continued:

It cannot be too directly or clearly stated that a petitioner is not entitled to a decree of divorce unless he or she is free from the matrimonial offence of adultery. If he or she has been guilty of adultery, that adultery must be fully and frankly disclosed to the court and the court must be invited to exercise the discretion vested in it by statute. It is the duty of a solicitor and of anybody representing a solicitor, who is acting for a prospective petitioner to make quite certain as far as humanly possible whether such a person has been guilty of adultery. If so, he must advise his client clearly as to the legal effect of his or her adultery and make it plain to the client that either the suit must be abandoned or, if pursued, the court must be invited to exercise its discretion and that all the relevant facts must be placed before the court. If, on being so fully advised, the client decides to proceed and to apply for the exercise of the discretion of the court the solicitor must obtain particulars and have a discretion statement prepared and filed in which those particulars are set out, and in which are specified any circumstances that would or might mitigate the matrimonial offence so disclosed and, perhaps, incline the court to exercise its

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discretion and grant a decree notwithstanding the matrimonial offence.

Those are matters about which the petitioner is bound, not only in conscience, but in law, to be faithful and truthful in giving information to the solicitor; and the solicitor is bound not only in conscience but in law, as an officer of the court, to leave out nothing that ought to appear in the discretion statement. It follows from this that the greatest possible care should be taken by a solicitor or his clerk to be quite clear in his language and so to speak to the petitioner about these matters as to put any misunderstanding beyond the bounds of possibility. If a solicitor or his clerk uses language which is ambiguous, confusing, or otherwise liable to misunderstanding he lays himself open to the suspicion that he is intentionally vague and ambiguous, using words which would enable him to conceal from the court adultery which was, in fact, or which, if he were too careful and thorough, might become, known to him.

It was because of that possible suspicion that I gave to Mr. T. the opportunity of dealing with these matters, and I am satisfied that he had no intention of concealing anything from the court by the use of vague, confusing and ambiguous language when he was talking to the petitioner. But it is important that neither he nor anybody else acting in a similar capacity should run the risk of being suspected of such conduct, and that there should be no risk of the court being deceived because language was used which failed to bring home to the petitioner the real significance of the question. Solicitors do not do their duty unless they leave nothing undone, unless they leave no possibility of misunderstanding, unless they are at any time able to show that the language which they used to their client in such a case was such as to be beyond the possibility of being misunderstood.

Although I have acquitted Mr. T. of any suspicion of a wicked design, I cannot acquit him of this, that he used language which he told me it was customary for him to use in such cases, and said to all intents and purposes: "Have you anything to disclose so far as your own conduct is concerned; as if there is, it will have to be included in the petition." For myself I cannot conceive anything less likely to convey to a proposed petitioner the matter that she was then intended to understand. "Have you anything to disclose?" How is a petitioner to know whether a thing is to be disclosed or not if she does not know what the solicitor is thinking about? There is no

explanation, there is no reference to the very thing that is vital. Moreover, he tells me that he put this question before the petition was filed: "Has anything happened in the meantime with regard to your own conduct?" It might mean anything—or nothing. It would not enlighten an uninformed person in the slightest degree.

It is so easy to be clear and plain in these matters, as in most others; it is equally reprehensible to take too much for granted. In these cases there is no room for carelessness. They must be done properly by everybody who is concerned in them. Yet there is no suggestion from first to last in this case that the word "adultery" was ever used.

This is not the only case in which such matters have been handled in the same slipshod fashion, with a grave risk of injustice being done. It should be stopped; and there should be a return by those in the profession to the old-fashioned method of seeing that everything is done with meticulous and complete care—that nothing is left to chance; and unless they do so they are unconsciously participating in the risk of injustice occurring even to their own client, certainly producing a risk of the court being unable to do justice because it is not in possession of facts and material which it is the solicitors' duty to see are put before it.

It is gratifying to know that there are still very large sections of the population who are stern and strict, not only in their views but in their conduct as to the faithfulness owed by each partner to the other; but the general atmosphere allows a great deal of loose thinking and loose opinion among certain sections of the public. In considering Mrs. Barnacle's story I may say that I have met reasonably well-educated and well-informed business men of forty and upwards who honestly thought and said: "Adultery is having sexual connexion with a woman not your wife, who is not over fifty years of age; and it is not adultery if she is over fifty." It was, at first, not easy to convince them that the woman's age was irrelevant. Other instances of ignorance on the part of petitioners of the real meaning of the word "adultery" which have come to the notice of the King's Proctor are: "I did not think it was adultery during the daytime"; "I thought it meant getting a girl into trouble"; and "I thought it meant drinking with men in public houses." In view of those examples of the possibility of some persons seriously entertaining what appears, on its face, to be a ridiculous notion; when I am

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told by Mrs. Barnacle that she was asked by Mr. T. whether she had been doing what her husband had done, it is possible that she thought that he meant: "Have you had sexual connexion with a man with the result that a child was born?" The language which Mr. T. says that he used does not assist me; in all the circumstances I am inclined to accept, and I do accept, the possibility that she might have held this or some other erroneous view.

[His Lordship considered some of the evidence and observed that he had no doubt that the petitioner then realized, and by degrees must have begun long since to realize, that what she had done was a wicked thing, but that he had no doubt that it was only recently that she had become aware of her duty to disclose it to the court. His Lordship then referred to the discretion statement and continued:]

The discretion statement begins in a form that I deprecate, and that I am glad to think is becoming less and less used—"The facts which require the discretion of the court to be exercised": no facts can, of themselves, require the discretion of the court to be exercised. The facts require an application to the court for the exercise of its discretion. There is an idea—it is not only a wrong one, but a widely held one—that if a party sets out the facts, he or she is entitled as of right to have his or her decree. It is not so. It must be understood that the matter is entirely in the discretion of the court, and that the court is bound by certain well-known considerations and principles in the exercise of its discretion, which is of such grave importance that the presentation of the application for its exercise must be accompanied by the utmost care and completeness.

[His Lordship then considered the facts of the case, and continued:] Having regard to the principles on which these matters rest, I have come to the conclusion that I ought to exercise discretion, and I do so, with the result that the decree will be allowed to stand.

Solicitors: *Bramley & Coombe* (1), *Sheffield*; *The King's Proctor*.

(1) This firm did not act for the petitioner in the divorce proceedings.

J. B. G.

FISHER v. FISHER.

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Mar. 15.

Divorce—Application to present petition within three years of marriage—Exceptional hardship or depravity—Discretion of judge to grant dispensation—Matrimonial Causes Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 57), s. 1, sub-s. 1.

Lord Greene
M.R.,
Bucknill L.J.
and Hodson J.

On marriage both parties were under twenty years of age and served in H.M. Forces. During the honeymoon, the wife stated that she did not wish to have children and agreed to have intercourse only on condition that the husband used a contraceptive. She adopted the same attitude on a later occasion when he came home for a week-end, and on another week-end, when he had no contraceptive, the wife refused sexual intercourse. About three or four months after the wedding, the wife wrote the husband to the effect that she did not wish to live with him as his wife and suggested a divorce; later she made a statement admitting adultery with an American sailor on various occasions between April, 1947, and January 3, 1948. The husband applied for leave to present a divorce petition notwithstanding that the period of three years from the date of the marriage had not elapsed. Pilcher J. refused the application, and the husband appealed:

Held that the court would not interfere with the exercise of the discretion of the judge of first instance unless it was clear that he had misapplied the law, or misunderstood the evidence, or given excessive or insufficient weight thereto. There was no reason for interfering in the present case with the exercise of his discretion by Pilcher J.

Held also by BUCKNILL L.J.: Apart from the question of discretion of the judge of first instance, the facts of the case did not disclose exceptional hardship or depravity within the meaning of the proviso to s. 1, sub-s. 1 of the Matrimonial Causes Act, 1937.

APPEAL from an order of Pilcher J. refusing an application by the husband for leave to present a divorce petition notwithstanding that the period of three years from the date of marriage had not elapsed.

The facts are stated in the judgment of BUCKNILL L.J.

K. Bruce Campbell for the husband, contended that the case was of exceptional hardship on five grounds (1.) the wife refused to bear children (2.) she had written only a few months after the wedding that she did not intend to live with the husband as his wife (3.) she subsequently committed adultery (4.) the wife's conduct had a bad effect upon the husband's health and was detrimental to his career in the army and (5.) it was merely the

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

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husband's misfortune that the petition for annulment was not heard before the decision of the House of Lords in *Baxter v. Baxter* (1). Counsel asked the court to lay down some rule of guidance in interpreting the proviso to s. 1, sub-s. 1, of the Matrimonial Causes Act, 1937.

The wife did not appear.

BUCKNILL L.J. It appears that Pilcher J. expressed the opinion that this was a difficult case, and one in which, he thought, the facts might very well be reviewed by the Court of Appeal. He accordingly refused leave to file a petition and gave leave to appeal. The court must approach the case from the point of view that the judge has exercised his discretion in the matter, as his duty clearly was. The court is faced with the initial difficulty that it is very unwilling to disturb the exercise of discretion unless it is clear that the judge has misapplied the law, or misunderstood the evidence or given excessive or insufficient weight to evidence. We have not the advantage of a judgment from the judge, and, therefore, we are not able to say why he refused to exercise his discretion and to grant the husband leave to present a petition. That will involve examining the facts closely and also consideration of the Matrimonial Causes Act, 1937, s. 1, which contains the provision that no petition for divorce shall be presented to the High Court unless at the date of the petition three years have passed since the date of the marriage. The provision that the petition shall not be presented until three years have passed was enacted not only to deter people from rushing into ill-advised marriages, but also to prevent them from rushing out of marriage so soon as they discovered that their marriage was not what they expected. Section 1, however, goes on by way of proviso to the section, to allow a petition to be presented within three years on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. It seems to me that the judge here had to decide whether the case was one of exceptional hardship or of exceptional depravity, and that, when he had come to a conclusion on that, he had to exercise his discretion and decide whether the case was one in which he should give leave.

Speaking for myself, I think that there is no possibility of a reconciliation here, but the difficulty in my mind, quite apart from the question of the discretion of the judge, is to say

whether the evidence clearly establishes that there was exceptional hardship or exceptional depravity. The facts are as follows. The husband met his wife in 1942, when he must have been about fifteen years of age and she about thirteen years of age. He went into the Army and met his wife again on July 9, 1946. On July 20, 1946, they were married. The marriage started unhappily because on the first night the wife refused to allow him to have intercourse unless he used a contraceptive. The husband had a contraceptive. When about to use it he asked his wife why she took up that attitude, and she stated that she did not wish to have any children. The honeymoon lasted for nine days, when he went back to his unit, and during the whole of that time she adopted the same attitude about contraceptives. He came home for one week-end and again had intercourse with the use of a contraceptive. In September, 1946, he came home for a week-end, but had no contraceptive, and the wife refused sexual intercourse. On November 3, 1946, the husband received a letter from his wife which was to the effect that she did not love him sufficiently to go on living with him as his wife and suggested that he should try for a divorce. He then endeavoured through the appropriate channels to obtain a poor persons' certificate to launch a petition for the annulment of his marriage on the grounds of the wilful refusal of his wife to consummate it. The petition was prepared by November 17, 1947. Just a month later the House of Lords decided in *Baxter v. Baxter* (1) that insistence by one spouse on use of a contraceptive was no ground for annulment of marriage, and, therefore, that avenue for bringing the marriage to an end was closed. On January 14, 1948, the wife made a statement in the course of which she admitted that in April, 1947, she had committed adultery with an American seaman who was a divorced person, and that from that time onwards she had committed adultery with him on a number of occasions, the last being on January 3, 1948. On that admission by the wife the husband sought leave to file a petition on the ground of her adultery. On the hearing of this summons before the judge the wife did not appear.

On those facts counsel for the husband has argued that this case is one of exceptional hardship on five grounds. The first ground was that the wife refused to bear her husband children. It seems to me that, having regard to the youth of these parties, and the wife being at that time in the W.A.A.F., the mere

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fact that she refused to bear him children during the nine days honeymoon and two week-ends and asked him to use a contraceptive, which he himself had, cannot be said to constitute exceptional hardship. The second ground of hardship advanced was that the wife in her letter of November, 1946, written some four months after the wedding, told the husband that she did not intend living with him any more. It was argued that, as there was no hope of a reconciliation, this was exceptionally hard on the husband. It appears to me that that might apply in nearly every case where the wife, or the husband, shortly after the marriage decides that they have made a mistake and intimates that he or she does not intend to go on with the marriage. If the court were to treat that as exceptional hardship, it would be very difficult to know where to draw the line. The fact that the wife subsequently started to commit adultery with another man is also, no doubt, hard on the husband, but, again, I cannot see that it is a case of exceptional hardship. In every case where one of the parties commits adultery it is hard on the innocent spouse. I can see nothing in this case which makes me feel that the wife is exceptionally depraved or which imposes exceptional hardship on the husband. It was then argued that the conduct of the wife had had a bad effect on the husband's health and was detrimental to his career in the army. [His Lordship referred to a letter to that effect from the husband's commanding officer, and continued:] I feel that it ought to be very clearly established that the facts do have a very serious effect on the health of the petitioner before one can say that the case is one in which the proviso to s. 1, sub-s. 1, ought to operate. It was argued, finally, that it was hard on the husband that he had been unable to get his case into the list before the House of Lords decided *Baxter v. Baxter* (1). I cannot credit that point with much merit. All I can say is that those who succeeded in obtaining their decree before the law had been established in the House of Lords were, perhaps, fortunate.

On the facts above stated, if this matter had come before me in the first instance I should not have felt that the husband had established a case sufficiently strong to be outside the rule laid down in s. 1, sub-s. 1. The judge has exercised his discretion and taken the same view. Counsel for the husband asked the court to lay down some rule for guidance in interpreting this sub-section; but the words

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used are quite plain ; there are no words in it which are not ordinary English words. The sub-section raises points which must always be peculiar to the special circumstances of each case. To lay down any general rule would not really give assistance to those whose duty it is to exercise this very difficult discretion in the first instance. There must very often be cases in which the judge's sympathy is with the petitioner but that does not make it a case of exceptional hardship. In my opinion the appeal should be dismissed.

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HODSON J. I agree. It is exceptionally difficult even to give examples which might assist a judge of first instance in exercising a discretion of this kind. As I read s. 1, sub-s. 1, of the Act of 1937 the emphasis is on the preservation of the marriage for the statutory period of three years at least. Therefore, in order that a case may be within the proviso the judge has to decide whether the hardship or depravity is exceptional. Without expressing any opinion of my own whether I should have come to the conclusion that there was any hardship or depravity here which was exceptional, I agree that there is no reason for interference with the discretion exercised by Pilcher J.

LORD GREENE M.R. I agree that there is nothing here which suggests that the judge misdirected himself or misinterpreted the Act of 1937. There is nothing to suggest that he excluded from his consideration things which he ought to have taken into consideration or took into consideration things which he ought not to have taken into consideration. In the absence of a judgment given by the judge, reference to which would indicate some ground on which we could, perhaps, interfere, we cannot in my opinion interfere at all. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the husband : *The Law Society's Service Divorce Department.*

Followed. SIMPSON
v. SIMPSON
[1951] P. 320

Approved. SIMPSON v. SIMPSON.
[1951] 1 All E.R. 955.

EDWARDS v. EDWARDS.

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Dec. 12.

Lord Merriman
P. and
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Divorce — Justices — Desertion — Constructive desertion — Conduct of respondent spouse—Natural consequences of such conduct—Where such conduct may involve third parties.

Applied. HAYNES
v. HAYNES
[1952] P. 272

The established principle that a man must be taken to intend the natural consequences of his acts if his wife leaves him because of his direct treatment of her is also applicable when the husband's conduct is conduct with a third person which he must know will affect his wife indirectly.

Boyd v. Boyd [1938] W. N. 336; 55 T. L. R. 3, disapproved.

In every case of desertion, whether ordinary or constructive, the amends which the guilty spouse must make are a question of degree; in a simple case a return to the matrimonial home is sufficient; but there may be some conduct so gross that no woman could be expected ever to resume cohabitation with her husband.

Price v. Price (1951) P. 198

HUSBAND'S APPEAL to the Divisional Court.

On September 22, 1947, the Liverpool City justices sitting at Dale Street, Liverpool, made an order for maintenance against the appellant on the ground of desertion. The magistrates stated: "Owing to the conduct of the defendant the complainant is justified in refusing to live with him. The defendant's conduct on the day that his wife left the matrimonial home, and for a considerable time prior to that, appears to us to have been directed towards the discontinuance of the married life; and we think that the wife was forced to leave the defendant in order to ensure her future safety."

The appellant had assaulted his wife on more than one occasion and the police had been called after the final incident, which was the direct cause of the wife's leaving him on August 29, 1947. She had left a note behind, which read: "You can do as you like. I can work for my children I am going to apply for a separation Don't ask me back. Glad to see the last of you."

During argument reference was made among other cases to *Boyd v. Boyd* (1) on the question of the respondent spouse's intention or otherwise to drive away his wife.

H. S. Law for the appellant.

Roger Ormrod for the respondent.

(1) [1938] W. N. 336; 55 T. L. R. 3.

LORD MERRIMAN P. after referring to the facts and observing that it was impossible to say that there was no evidence to support the finding of the magistrates (that it was for the wife's protection and her future safety that she had left the matrimonial home) continued :

We have been referred to two cases on the subject of constructive desertion, namely *Charter v. Charter* (1), a judgment of a Divisional Court consisting of the late Lord St. Helier and the late Lord Gorell, and *Boyd v. Boyd* (2), which are frequently relied on when a husband has a difficult case to argue in this court. Both cases emphasize the indisputable principle that before a spouse can be charged with desertion there must be an intention to desert ; but I can find nothing in Lord St. Helier's judgment in *Charter v. Charter* (1) which can assist a husband in this or any similar case, for the whole point of that case was that when the husband, who had not done anything particularly serious to his wife, had told her in a fit of temper to "get out," she had taken him at his word and left ; and when he had tried to get her back again she had refused to return. The court found that it was obvious that the wife went away of her own free will, and not because she was compelled to do so, and that the separation was not contrary to the wishes of the wife, but was really a separation by mutual consent until the husband subsequently expressed his willingness to resume cohabitation. It was on these facts that Lord St. Helier made the remarks which are so often relied upon. "It is clear law," he said (1), "that desertion by a husband does not necessarily mean that he has actually turned his wife out of doors. It is sufficient to constitute desertion if his conduct is such as to compel her to leave his house. The principle which underlies the cases is the intention of the husband to break off matrimonial relations." And then he went on to deal with the case before him, which he described as being merely the result of a quarrel. That shows very shortly and neatly the real point in a charge of constructive desertion. On at least one occasion, if not on many more, when this case has been cited, it has been pointed out by this court that the logical effect of Lord St. Helier's words was that a man must be taken to intend the natural consequences of his acts. Indeed, though Lord St. Helier did not use those words, he contrasted a case in which the wife was actually

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(1) (1901) 17 T. L. R. 327 ; 84 (2) [1938] W. N. 336 ; 55
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turned out of doors with a case in which the husband's conduct was such as to compel his wife to leave the house. It is sufficient for me to say that in late years it has been laid down over and over again that a man must, on well-known principles, be taken to intend the natural and reasonable consequences of his own acts ; and there I leave *Charter v. Charter* (1), with nothing but approval, but without understanding how it assists the husband in this case.

That brings me to *Boyd v. Boyd* (2). That was a case in which, unlike *Charter v. Charter* (1), and unlike this case, the husband had done nothing whatever to the wife directly, nothing, as I ventured to put it in the course of the argument, except be his own extremely nasty self. He was charged with constructive desertion in the following circumstances : three years after the marriage, which took place in 1923, he was sentenced to five years' penal servitude for incest with his own daughter. It is true that the daughter was by a former wife ; but that was the sort of conduct which would be likely to cause any decent woman with whom he was living the greatest possible feeling of revulsion. When he came out of prison she actually took him back, although, let it be noted, she had a complete case against him, for this was a case of adulterous incest. However, she took him back, and he was later convicted of an indecent assault on a girl under thirteen years of age, and was sentenced to imprisonment for twenty months. The learned judge who tried the case, Bucknill J., as he then was, actually found in terms that that was " a terrible shock to the petitioner, " and endangered her health " (2) ; but with regard to the suggestion that this amounted to desertion constructively, he said (2) : " It seems to me that the essential element " in desertion must be the intention to bring the cohabitation " to an end. It may be that the husband has behaved so badly " that his wife leaves him, and it may be that his conduct " amounts to cruelty, when the wife can get a divorce on that " ground, but, before there can be a case of constructive " desertion, the court must be satisfied that the conduct of the " husband was such as to show a clear intention on his part to " drive his wife away. There must be an intention on the part " of the person charged with desertion to bring the cohabitation " to an end. There is no evidence here of any such intention. " The man seems to be a sexual pervert who is unable to control

(1) 17 T. L. R. 327 ; 84 L. T. (2) [1938] W. N. 336 ; 55
272. T. L. R. 3.

"himself, but there is no evidence that at any time he has
 "ceased to wish to live with his wife. It was his wife, on the
 "other hand, who refused to live with him. It seems to me to
 "be quite clear, therefore, that no case of constructive desertion
 "has been made out."

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I have the most profound respect for that learned judge, and I am not conscious of ever having differed from any other judgment which he has delivered ; but with the greatest respect I think that that judgment is wrong, and that, as we are not bound by it, and as this case is constantly being cited to us, we are not merely entitled, but bound, to say so.

I have mentioned the fact that this court, and, indeed, many judges in the Division individually, have referred over and over again to the principle that a man must be taken to intend the natural consequences of his acts, and if it is a natural consequence of a man's direct treatment of his wife that she leaves him, it is a commonplace that he must be taken to intend her to do so whatever words he may have used. If that is so, why does not precisely the same principle apply when the conduct of the husband is conduct with a third person which he must know will affect the wife indirectly ? Be it remembered that the learned judge himself held as a fact that when the second conviction took place it was a terrible shock to the petitioner, who had taken this man back after one of the most dreadful things which could very well occur in a married life, and that he had done something of the same sort again. The learned judge had found in fact that it was a terrible shock to her and endangered her health, that it might well amount to cruelty (1) and yet that it did not amount to desertion. Cruelty does not necessarily consist of physical violence. In the well-known definition in *Russell v. Russell* (2) there is included misconduct which causes injury to health, bodily or mental, or, at least, a reasonable apprehension of such injury ; and in *Boyd v. Boyd* (3) it was found that the husband's conduct did cause injury to her health, and I cannot understand how any man who has been taken back after one such incident by a sensitive and decent woman could contemplate anything else than that a repetition of that offence would have the same result. It may be that the circumstances of that case were so special that it can be dealt with in isolation, but I cannot assent to the principle

(1) The marriage was in fact T. L. R. 3.
 later dissolved by Bucknill J. (2) [1895] P. 315, 322.
 on the ground of cruelty after an (3) [1938] W. N. 336 ; 55
 amendment of the petition : 55 T. L. R. 3.

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which is laid down in the passages which I have quoted for the reasons that I have just given. I have only said what I have said about that case because in almost every case in which an appellant husband is appealing to this court against a charge of constructive desertion we are confronted with that judgment. I hope that we shall not be confronted with it again.

Having said that, and said it with the greatest possible respect to the learned judge who pronounced it, I must say that I think that this case is unarguable on the facts. There was ample material on which the justices could find, as they have found, that this woman was driven from home. We have also been confronted, as we are so frequently in cases of desertion, with what are said to be the inevitable consequences, namely, that in three years' time she will be able to divorce him; and, perhaps, in this case with some justification, because the justices' reasons might, if taken literally, be taken to mean that this man has no locus pœnitentiæ whatever. I do not think that the justices meant that, but if they did, let it be plainly understood that in every case, whether of ordinary desertion or constructive desertion, it is a question of degree what amends a husband must be prepared to make before he can suggest that his wife should take him back. In the ordinary simple case of desertion all he has to do is to return to the matrimonial home. Where he has driven his wife away by some cruel conduct, the case is different: it is a question of degree. There may be some conduct so gross that no woman could be expected ever to resume cohabitation with him. The point is that every case must be dealt with on its merits, and if his merits are so slight that the husband has very little hope of ever being taken back, that is one of the consequences of his own conduct, and it ought not to affect the result of the case. For these reasons, in my opinion this appeal fails, and must be dismissed.

BARNARD J. I agree with my Lord, and I particularly agree with what he has said about the judgment of Bucknill J. in *Boyd v. Boyd* (1). In my opinion he has gone a little too far in requiring in a case of constructive desertion some definite evidence of a clear intention on the part of one spouse to drive the other spouse away. As my Lord has already said, a man must be presumed to intend the natural consequences of his acts, and there is a very striking example of that in the

(1) [1938] W. N. 336; 55 T. L. R. 3.

judgment of Gorell Barnes J., as he then was, in *Sickert v. Sickert* (1). I notice that Bucknill J. was never referred to that case when he decided *Boyd v. Boyd* (2). Gorell Barnes J., in dealing with constructive desertion, gives what I think is a very clear example of a presumed intention, when he says :
 “ A wife whose husband is carrying on adulterous intercourse
 “ with another woman or other women is not bound to remain
 “ in cohabitation with him ; she can at once obtain a judicial
 “ separation. She may, however, be willing to remain with her
 “ husband provided he will give up the connexion complained
 “ of, and if he refuses to do so, a wife with any self-respect
 “ has only one course to take—that is, to withdraw from
 “ cohabitation. , The husband in such a case must be taken to
 “ intend the consequences of his action that is to say, that
 “ his wife shall not live with him. The situation then pro-
 “ duced is just the same as if the guilty husband left his wife.
 “ Desertion is not to be tested by merely ascertaining which
 “ party left the matrimonial home first. It may be committed
 “ by a husband acting as I have just said, and if the attitude
 “ of the parties remains the same for two years the offence of
 “ desertion contemplated by the statute is complete.”

I only want to say further, that with regard to this particular case, for the reasons that my Lord has given I agree with him that this appeal must be dismissed.

Appeal dismissed.

Solicitors : *Oswald Hickson, Collier & Co., for G. H. Stock & Co., Liverpool ; Helder, Roberts, Giles & Co., for John A. Behn, Twyford & Reece, Liverpool.*

(1) [1899] P. 278, 283.

(2) [1938] W. N. 336 ; 55
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IN THE ESTATE OF MORTIFEE, DECED.

Probate — Practice — Deceased intestate and without known kin — Grant of letters of administration to Treasury Solicitor—Exclusion of property no longer settled land—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 155, sub-s. 1, s. 162—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 16—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 7, sub-s. 5, s. 8, sub-s. 3.

Should a person die intestate and without known kin the court, in granting letters of administration of the estate to the Treasury Solicitor, may except from such grant any land of which the intestate was tenant for life and which on his or her death ceased to be settled land: and it may make a grant limited to that land to the person beneficially entitled thereto on the death of the intestate.

PROBATE MOTION.

The deceased died intestate in January, 1946, a widow without known kin, and possessed of free estate to the value of a few hundred pounds. She was tenant for life of a freehold property in Bristol under the will of her late husband Samuel Mortifee, who had died in 1943. By his will Samuel Mortifee gave “. . . my dwelling-house number 18 Metford Road “Redland Bristol unto my executor upon trust for the said “Catherine Jacqueline Richards for her life or widowhood “and upon the death of the said Catherine Jacqueline “Richards or her re-marriage whichever event shall first happen “then I give such . . . dwelling house unto my daughter “Hilda Irene Burden absolutely.” The will was made in contemplation of his marriage with C. J. Richards, which was subsequently solemnized in May, 1939. Hilda Burden was a married daughter of Samuel Mortifee by an earlier marriage. On the death of Mrs. Catherine Jacqueline Mortifee the settlement created by her husband’s will accordingly came to an end and the house passed thereunder to her stepdaughter absolutely.

The court was moved by the Treasury Solicitor to decree: “that letters of administration of the estate of Catherine “Jacqueline Mortifee save and except any land of which the “said deceased was tenant for life and which on her death “ceased to be settled land be granted to the solicitor for the “affairs of His Majesty’s Treasury. . . .”

Notice of motion was served on Hilda Irene Burden as “the “remainderman entitled under the settlement created by the

"will of Samuel Mortifee deceased on the death of the above-named deceased."

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Pennycuik K.C. and *Victor Russell* for the Treasury Solicitor. The practice in such cases has been for a general grant to issue to the estate of the deceased tenant for life without reference to the settled land; and (failing kin) either the Treasury Solicitor has taken a general grant or a general grant has been made to the remainderman on motion under s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1). This practice has been based on *In the Estate of Bordass* (2), in which a general grant of administration including the settled land was made to the remainderman; and *In the Estate of Birch* (3) in which the court made a similar grant. According to the headnote of *In the Estate of Bordass* (2) the "principle of the decision in *In re Bridgett and Hayes' Contract* (4) was followed"; but it is submitted that while *In re Bridgett and Hayes' Contract* (4) is authority for holding that "the legal estate in land vests in the person to whom a general grant of probate has been made, and he can give a

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (as amended by the Administration of Justice Act, 1928, s. 9): "In granting administration the High Court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with the will annexed may be granted to a devisee or legatee, and in regard to land settled previously to the death of the deceased and not by his will, may be granted to the trustees of the settlement, and any such administration may be limited in any way the court thinks fit:

"Provided that

"(a) where the deceased died wholly intestate as to his estate, administration shall be granted to some one or more persons interested in the residuary estate of the deceased, if they make an

"application for the purpose, and as regards lands settled previously to the death of the deceased, be granted to the trustees, if any, of the settlement, if willing to act; and
"(b) if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the court may in its discretion, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the court thinks fit."

(2) [1929] P. 107.

(3) [1929] P. 164.

(4) [1928] Ch. 163.

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“good title thereto,” neither that case nor *In the Estate of Bordass* (1) nor *In the Estate of Birch* (2) lay down that a grant cannot be severed in a suitable case.

By s. 155 of the Supreme Court of Judicature (Consolidation) Act, 1925 (3) the courts have power to grant representation of real and personal estate separately or together. Reliance was placed in argument on that section in *In re Dalley* (4), in which it was held (by the same judge (Hill J.) as in the cases of *Bordass* and *Birch*) that : “Where a tenant for “life of settled land dies intestate and there is no person “entitled to a general grant of administration and no property “in respect of which such grant could be made, the court has “power to grant administration, limited to the trust estate “vested in the intestate, to the person entitled in remainder.”

In cases such as the present, in which the Treasury Solicitor has to deal as nominee of the Crown in the absence of an effective will and in default of entitled kin, the effect of a refusal to sever the grant is to place an unnecessary burden on the Treasury Solicitor. As a result of a general grant to him the legal estate would vest in him in accordance with the principle of *In re Bridgett and Hayes' Contract* (5). As general personal representative the Treasury Solicitor would become accountable for death duties, in respect of the land previously settled, by s. 16, sub-s. 1, of the Law of Property Act, 1925 ; he would also be obliged by s. 7, sub-s. 5 and by s. 8, sub-s. 3, of the Settled Land Act, 1925 to ascertain the person entitled to require a conveyance of the land and make a conveyance to that person. It is submitted that such results arising from a general grant to the Treasury Solicitor are inconvenient, since

(1) [1929] P. 107.

(2) [1929] P. 164.

(3) Supreme Court of Judicature (Consolidation) Act, 1925, s. 155 :
“ (1.) Probate or administration
“ in respect of the real estate of a
“ deceased person, or any part
“ thereof, may be granted either
“ separately or together with
“ probate or administration of his
“ personal estate and may also
“ be granted in respect of real
“ estate only where there is no
“ personal estate, or in respect of a
“ trust estate only, and a grant of
“ administration to real estate

“ may be limited in any way the
“ court thinks proper :

“ Provided that where the estate
“ of the deceased is known to be
“ insolvent, the grant of repre-
“ sentation to the estate shall not
“ be severed except as regards a
“ trust estate.

“ (2.) Provision may be made by
“ probate rules and orders for
“ adapting to the case of real
“ estate the procedure and practice
“ on the grant of administration.”

(4) (1927) 136 L. T. 223.

(5) [1928] Ch. 163.

he would have no knowledge of the settlement or of the beneficiaries under it, although he might have to deal in some cases with difficulties arising from, for example, the complexity of a trust instrument with which he had no direct concern.

This is, therefore, a case in which it would be convenient to all parties for the court to make a grant as prayed, leaving it to the persons who were interested in the land to apply for a separate grant in respect of that land.

Kemp for the remainderman associated himself with the request of the Treasury Solicitor that the grant be severed, and upon a pro forma motion asked for a grant limited to the land previously settled.

PITCHER J. I will make the order as prayed. The court has the necessary power so to do by virtue of s. 155 of the Supreme Court of Judicature (Consolidation) Act, 1925. I will also make the order prayed by the remainderman. This course appears to be a convenient one for both parties.

Solicitors : *The Treasury Solicitor ; Raymond Cossham & Co.*

J. B. G.

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Divorce — Desertion — Wife's departure from home with daughters — Offer to return — Husband's refusal to have daughters back.

Apr. 23.

Tucker and
Evershed L.JJ.
and
Hodson J.

A husband and wife were living with their daughters in the matrimonial home in London in 1941 during the aerial bombardment. In consequence of friction between the husband and the daughters, the wife went with the latter and most of the furniture to live elsewhere. On the husband's asking the wife to return, she agreed to return with the daughters. The husband would only have her back if she came without the daughters. She was unwilling to return on those terms. On the husband's petition for divorce on the ground of desertion,

Held, that, as there was insufficient evidence to prove that the daughters' conduct in the home would have justified a reasonable father in demanding their exclusion from it, and as it was reasonable for the wife to refuse to abandon her daughters in the

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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prevailing war conditions, she was not guilty of desertion in remaining apart from her husband.

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Dictum of Butt J. in *French-Brewster v. French-Brewster* (1889) 62 L. T. 609, 611 approved.

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APPEAL from Mr. Commissioner Carthew.

The appellant husband and the respondent, his wife, were married in 1916. At the date of the hearing of the petition they were aged fifty-six and fifty-four years respectively. There were four children of the marriage, all daughters, one of whom, having married, was no longer living in the matrimonial home at the time of the hearing. There had been friction between husband and wife in 1924, and they had consequently lived apart for a time. In 1935 the wife obtained an order for maintenance on the ground of desertion, but cohabitation was resumed, and for some years before April, 1941, husband and wife had been living with their children in Streatham. Evidence was given of friction in the home between the father and his daughters, then aged seventeen, eighteen and nineteen years, respectively. His evidence was that they were bringing visitors to the house too freely, not introducing them to him, and, generally, behaving in an undisciplined manner. The evidence for the wife was that he was unduly censorious and strict with regard to the daughters. The evidence established simply that there was a somewhat unpleasant atmosphere in the home by April, 1941. One day in that month the husband returned to his home to find that the wife had left the house with the three daughters and most of the furniture, and had removed to another house in the neighbourhood, which she had taken without the husband's knowledge. The daughters had consented to leave the home with the mother. The next day the father found where they were and asked the wife to return. She was willing to do so on condition that she brought the children home with her. The husband was unwilling to have her back on those terms. On several occasions he saw the wife and renewed his request to her to return, on each occasion with the same result. He accordingly launched this petition for divorce on the ground of his wife's desertion.

The commissioner found that the wife had in fact deserted the husband in April, 1941, that she had later expressed her willingness to return to him on certain conditions, but that he had unreasonably refused to accept her back on those conditions. He held that the husband had imposed a con-

dition with regard to his wife's return which was in fact unreasonable, and that, therefore, desertion could not be held to have continued. The husband now appealed.

William Latey for the husband.

Figgis for the wife.

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TUCKER L.J. The whole case turns on the questions (1.) whether or not the condition imposed by the husband with regard to the return of his wife, namely, that he would not take her back if she brought the children, was in fact imposed, and (2.) whether, if it was, the condition thus imposed was reasonable or unreasonable.

[His Lordship reviewed the evidence given before the commissioner, and continued:] The findings of the commissioner with regard to that evidence are as follows:

"On the question of whether she offered to return I accept the wife's version, and not the husband's of what happened, and I reject the petitioner's evidence on that point. I believe her when she said: 'I said I would not go back without the girls, and he refused to have them back. He did ask me several times to go back to him, but he did not want the children. If he had been willing to have the girls back I would have gone back to him.' That is the crucial point, in my view. I believe her, and there is some confirmation, though indirect, of her evidence that he did not want the children, namely, the evidence of the daughter who said that in the matrimonial home he did not seem to want them, ever." The commissioner proceeded: "I think that is wholly unreasonable, and, therefore, I hold that she did not refuse to return unreasonably; it is the husband's demand that she should go alone that I hold to be unreasonable."

I see no reason to come to a conclusion different from that arrived at by the commissioner on precisely what took place between the parties. I think that in substance the evidence shows that the presence of these girls in the home was the obstacle which prevented the parties from coming together again. It was an insuperable obstacle from the husband's point of view. I think that the evidence must be accepted as indicating that the offer was a real one on the part of the wife, who believed that the children would be willing to come with her if she were willing to take them and if the husband were willing to have them back. The evidence shows that that was the real obstacle, and it was an obstacle imposed by the husband.

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Tucker L.J.

I do not think that this case calls for much reference to authority, but the position is quite shortly and clearly stated by Butt J. in *French-Brewster v. French-Brewster* (1), where he said: "If the husband has left her for a time but is willing to return, and the wife refuses to receive him back except upon conditions she has no right to impose, she cannot set up his continued absence as desertion." The question, therefore, was whether the wife had the right to impose the conditions, or, to put it in another way, whether the conditions imposed by her were reasonable.

We were also referred to this statement by Lord Romer in *Cohen v. Cohen* (2): "My Lords, in my opinion, the decision in *Stevenson v. Stevenson* (3) in laying down a general principle applicable to all cases in which a deserted spouse presents a petition for divorce or judicial separation was wrong and should be overruled. The question whether a deserting spouse has reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be questions of fact, and the determination must depend upon the circumstances of the particular case. I deprecate attempts to lay down any general principle applicable to them all."

In the present case the question is whether the condition imposed by the husband was reasonable or unreasonable. I do not think that this is altogether an easy matter to decide, for this is a borderline case. My conclusion is that the commissioner came to a right decision on the matter. There was no evidence, certainly no sufficient evidence, to justify a finding that the conduct of these girls in the matrimonial home had been such as to justify a reasonable father in excluding them from the home. Furthermore, I think that we may take judicial notice of the kind of conditions prevailing in London, and, perhaps, particularly in Streatham, at this time of bombing. It was not, in my opinion, unreasonable that the wife should take a strong line about leaving these very young girls in those circumstances to fend for themselves, as it is impossible on the evidence to say that they had been guilty of any conduct which would justify their father in refusing to receive them into the home. I agree with the decision arrived at by the commissioner, and the appeal fails.

(1) (1889) 62 L. T. 609, 611. (3) [1911] P. 191.

(2) [1940] A. C. 631, 645.

EVERSHED L.J. I agree. The question is whether the husband's allegation is proved that the wife had deserted him without cause for the requisite period. As Lord Romer observed in the passage in *Cohen v. Cohen* (1) which TUCKER L.J., has read, that question is one of fact, the determination of which depends on the circumstances of the particular case. What were the relevant circumstances here? It is to be observed that in the petition the husband alleged that he had asked his wife to return to him, but that she had refused. In other words, he alleged on her part an unqualified refusal of his request. The truth emerges from the findings of the commissioner, if we accept them. He stated that he believed the wife to be a frank and candid witness. He believed her account of the request on the one side and the counter-offer on the other which may be put in this form: the mother, having admittedly gone in April, 1941, with the three unmarried daughters, expressed herself as willing to return provided that the children came back with her, whereas the husband was saying that he would not allow the children to come back to his house. True, the precise character of that offer and counter-offer only emerged from the evidence in answer to questions put by the commissioner, perhaps in a somewhat leading form; but, it seems to me, we are not entitled to depart from the commissioner's findings of fact. If that is accepted, having regard to all the circumstances, including the circumstances of the war, what is to be the conclusion? Was the wife's counter-offer, which was rejected, unjustifiable and unreasonable, so as to make her continued absence desertion without cause? The commissioner has come to the conclusion on these facts that she was not unreasonable. Though I agree with my Lord that the case is not an easy one, I, for my part, have not been persuaded that we should be justified in taking a different view from that at which the commissioner arrived. I therefore agree that this appeal should be dismissed.

HODSON J. I also agree.

Appeal dismissed.

Solicitors for the husband: *Corbin, Greener & Cook.*
Solicitors for the wife: *Collyer-Bristow & Co.*

(1) [1940] A. C. 631, 645.

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BRITTAN *v.* BRITTAN.

Apr. 30;
May 14.

Tucker and
Evershed L.JJ.
and
Hodson J.

Divorce — Poor persons — Ordinary litigant successful in proceedings — Poor person's liability for costs — Improvement in financial position after grant of certificate — Discretion of court — R. S. C., Or. 16, r. 28, sub-r. 1, r. 31BB.

By R. S. C., Or. 16, r. 28, sub-r. 1, a poor person "shall not be liable for any court fees and unless the court or a judge shall otherwise order no poor person shall be liable to pay costs to any other party or be entitled to receive from any other party any profit costs or charges."

There is nothing in that Order to limit the discretion conferred on the court by the words "unless the court or a judge shall otherwise order" in r. 28, sub-r. 1. An unfettered discretion is thereby left to a judge in a proper case to order a poor person to make such contribution as he thinks proper towards the costs of the opposing party, where the poor person's financial position has improved since his obtaining a poor person's certificate, or where the circumstances otherwise justify it. That general discretion is not limited by reference to the special power given by r. 31BB to make an order as to costs against a poor person who has obtained his certificate by fraud or misrepresentation whatever his financial position may be at the date of the order. Moreover, if a poor person is ordered to pay the costs of an ordinary litigant, he is thereby made liable to pay that litigant's costs taxed on the ordinary basis, and not on some special or reduced basis, such, for example, as would exclude profit costs and charges.

Only where careful investigation of evidence as to increase of means or other matters discloses wholly exceptional circumstances is it proper for the court to make an order against a poor person to pay the full taxed profit costs of the opposing party.

OLDS *v.* OLDS.

Appeal from Judge Kirkhouse Jenkins sitting as Divorce Commissioner at Bristol.

The appellant husband, a poor person, was unsuccessful in a petition for divorce defended by his wife as an ordinary litigant. The commissioner ordered that the wife "shall have the costs of these proceedings. I make it a special order." The order drawn up condemned the husband in the costs incurred on behalf of the wife as if the husband were not a poor person. The commissioner subsequently gave leave to appeal against the order, informing the Court of Appeal that

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

the order had been made without full argument and could not, in his opinion, be supported.

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BRITTAN *v.* BRITTAN.

Application for leave to appeal from the same commissioner.

The appellant husband, a poor person, was the unsuccessful respondent in a defended petition for divorce presented by his wife as an ordinary litigant. Before making his order for costs the commissioner was informed that, though the husband had been in the Forces when the poor person's certificate was issued, he was at the date of the trial earning 6*l.*-7*l.* a week in an aircraft factory. In view of that improvement in the husband's financial position, the commissioner in the exercise of his discretion ordered the husband to pay the full taxed costs of the wife. He refused leave to appeal against that order. The husband now applied for leave to appeal in pursuance of s. 31, sub-s. 1 (*h*), of the Supreme Court of Judicature (Consolidation) Act, 1925.

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A. J. Irvine for the appellant and the applicant husbands.

The respondent Mrs. Olds did not appear and was not represented.

C. M. Hughes for the respondent, Mrs. Brittan.

The arguments are sufficiently indicated in the judgment.

Cur. adv. vult.

April 14. TUCKER L.J., reading the judgment of the court, referred to the facts in *Olds v. Olds*, and continued: The commissioner, we are informed, felt himself unable to correct the order under the slip rule, but gave leave to appeal and made a note for the information of the court stating that the order was made without full argument and could not, in his judgment, be supported. We read his note as indicating that he had not fully appreciated either the possible implication of the words "special order," or the circumstances which might justify him in making such an order, and that in this case he was now satisfied that there were no circumstances which would warrant his making any order for payment of costs by the husband. We took the same view, and for these reasons allowed the appeal with the result that the order must be varied by striking out the words "and condemned the [husband] petitioner in the

C. A. "costs incurred in behalf of the said [wife] respondent as if he,
 1948 "the [husband] were not a poor person."

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[His Lordship referred to the facts in *Brittan v. Brittan*, and continued:] On this material the commissioner, exercising the discretion which he considered was conferred upon him by Or. 16, r. 28, sub-r. 1, of the Rules of the Supreme Court, made the order indicated above and refused leave to appeal.

By s. 31, sub-s. 1 (*h*), of the Supreme Court of Judicature (Consolidation) Act, 1925, no appeal lies "without leave of the court or judge making the order from an order of the High Court or a judge thereof made . . . as to costs only which by law are left to the discretion of the court." If, therefore, this order was one which the commissioner had a discretion to make no appeal lies to this court without his leave, provided that he has in fact exercised that discretion.

It was contended by counsel for the husband that the discretion of the commissioner under Or. 16, r. 28, sub-r. 1, with regard to awarding costs against a poor person was limited to making an order that he should pay such costs as would have been recoverable by him as a poor person had he succeeded and obtained an order for costs in his favour, and that the commissioner had no jurisdiction to make the order complained of. It was argued that Or. 16 must be read as a whole, and that if it were so read, and, more especially, having regard to r. 31BB, the true view was that no poor person could ever be ordered to pay the profit costs of the opposing party, or any part thereof, unless they came within r. 31BB. In the alternative, it was argued that, where the court orders a poor person to pay the costs of an ordinary litigant, the order should be drawn up and the costs taxed as if the successful litigant were a poor person.

The material provisions of Or. 16 are as follows. Rule 28, sub-r. 1, provides: "No court fee shall be payable in respect of the filing of the certificate nor in respect of the memorandum to be issued under rule 27 of this order and after such filing the poor person named in the certificate shall not be liable for any court fees and unless the court or a judge shall otherwise order no poor person shall be liable to pay costs to any other party or be entitled to receive from any other party any profit costs or charges."

Rule 29, sub-r. 1, provides: "The court or a judge may at any time (and whether or not any application be made by any Law Society or by any person for that purpose)

“ discharge the certificate and direct it to be taken off
 “ the file and thereupon the poor person shall not be
 “ entitled to the benefit of this order in any proceedings
 “ to which the certificate relates unless otherwise ordered.”

Rule 23B, sub-r. 4, reads: “ Where a certificate has been
 “ granted to a poor person under rule 23A of this Order
 “ or under this rule, it shall not be discharged under
 “ rule 29 hereof on the grounds only—(a) that the
 “ conditions specified in paragraphs (1.) and (2.) of the said
 “ rule 23A are no longer applicable in the case of the poor
 “ person; or (b) that the means of the poor person or, as the
 “ case may be, of the poor person and her husband, exceed the
 “ amounts specified in paragraphs (1.), (2.) and (3.) of rule 23
 “ of this Order: Provided that the committee may discharge
 “ any certificate so issued in any case in which they are satisfied
 “ that the means of the poor person or of the poor person and
 “ her husband jointly, as the case may be, so greatly exceed
 “ the amounts specified in paragraphs (1.), (2.) and (3.) of the
 “ said rule 23 as to render it unreasonable that the poor person
 “ should be entitled to the benefit of this Order.”

Rule 31BB is as follows: “ Where it appears to the court
 “ or a judge that the certificate was obtained by fraud or
 “ misrepresentation the court or judge may order the poor
 “ person to pay the costs of the other party, and where such
 “ an order is made, the costs shall be taxed as if the party
 “ ordered to pay them were not a poor person.”

In our view there is nothing in this order to limit the
 discretion clearly conferred upon the court by the words “ unless
 “ the court or a judge shall otherwise order ” in r. 28, sub-r. 1.
 We think that it was intended to leave the matter to the
 unfettered discretion of the judge so as to enable him in any
 proper case to order a poor person whose financial position
 has improved, or where the circumstances otherwise justify,
 to make such contribution as he thinks proper towards the
 costs of the opposing party. In our judgment this general
 discretion is not limited by the special power under r. 31BB
 to make an order as to costs against a poor person who has
 obtained his certificate by fraud or misrepresentation whatever
 his financial position may be at the date of the order.

If a poor person is ordered to pay the costs of an ordinary
 litigant, he is thereby made liable to pay that litigant's costs
 taxed on the ordinary basis; that is, there is no foundation for
 the suggestion that a poor person ordered to pay the costs of an

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ordinary litigant should pay costs taxed upon some special or reduced basis, for example, so as to exclude profit costs and charges. This result will be only achieved (in the absence of special direction) when the party whose costs are ordered to be paid by a poor person is himself a poor person. On the other hand, in a proper case a judge may order a poor person to pay or contribute some fixed sum, *xl.*, towards the other party's costs.

We are, therefore, of opinion that the commissioner had jurisdiction to make this order, which was within his discretion ; and, in the absence of leave by him to appeal, this court cannot entertain this application.

We should, perhaps, observe that in form the husband was asking this court to give him leave to appeal. If he was right in his contention that the commissioner was acting without jurisdiction, he could have appealed without leave. On the other hand, if the matter, as we hold, was within the discretion of the commissioner, we have no jurisdiction to entertain an appeal from his refusal to give leave. In coming to our decision we are not to be understood as approving the exercise of the commissioner's discretion in this particular case.

Although there may be cases in which it is proper, after careful investigation of evidence as to increase of means or other matters, to make an order for a poor person to make some contribution towards the costs of the opposing party, the circumstances would have to be wholly exceptional to justify an order against a poor person to pay the full taxed profit costs ; but, for the reasons stated, we have no jurisdiction to interfere.

The result is that the appeal in *Olds v. Olds* is allowed, and the application in *Brittan v. Brittan* refused.

Appeal allowed.

Application refused.

Solicitors for the appellant and applicant husbands : *Poor Persons Divorce Dept., Law Society.*

Solicitors for the respondent, Mrs. Brittan : *Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

Considered. WINNAN v. WINNAN.
[1948] 2 All E.R. 862.

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Divorce—Husband's petition on ground of adultery—Wife's claim for divorce on ground of cruelty—Previous order of stipendiary magistrate for judicial separation on ground of cruelty—Estoppel—Evidence to be taken on this issue—Costs—Decree in favour of wife—Successful appeal by husband—Considerations affecting order as to wife's costs—Matrimonial Causes Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 57), s. 6.

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Mar. 15, 16,
17, 18, 19,
22, 23, 24 ;
Apr. 26, 27 ;
May 12.

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Bucknill L.J.
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The Matrimonial Causes Act, 1937, s. 6, sub-s. 2, provides that when a petition is brought for divorce on a ground which has previously been used by the petitioner for obtaining a decree of judicial separation under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, "the court may treat the "decree of judicial separation . . . as sufficient proof of the "adultery, desertion or other grounds on which it was granted, "but the court shall not pronounce a decree of divorce without "receiving evidence from the petitioner."

Held that no estoppel is created although the findings of the court of summary jurisdiction may be treated as of strong probative value and the evidence of the petitioner to be received is intended to relate to evidence directed to the main issue in the case and is not confined to such matters as absolute and discretionary bars to a decree of divorce.

The proposition, based on *Otway v. Otway* (1881) 13 P. D. 141, *Earnshaw v. Earnshaw* [1896] P. 160, and *Medway v. Medway* [1900] P. 141, that a wife who succeeds in obtaining a decree of divorce and seeks to uphold it against the husband's appeal is entitled even though unsuccessful to have her costs paid by the husband, is too wide, as appearing to fetter the court in the exercise of its discretion.

Considerations to which the court may have regard in deciding whether the husband should pay the wife's costs include, besides the wife's means, (1.) the desirability of enabling the wife to litigate a reasonable case, (2.) the importance of a point of law raised and decided, (3.) the fact that the wife has manifestly committed perjury, (4.) the discouragement of speculative actions, and (5.) the misconduct of the wife, or her advisers, in respect of the litigation.

APPEAL from Mr. Commissioner Tyndale K.C.

In this case the petitioner, who was the husband, petitioned for a decree of divorce on the ground of his wife the respondent's alleged adultery with the co-respondent. The respondent and the co-respondent denied the alleged adultery and the respondent claimed a divorce on the ground of cruelty. Proceedings had previously been brought in a court of summary jurisdiction when the wife obtained a judicial separation on the

C. A. ground of cruelty similar in nature to that alleged in the present proceedings. Mr. Commissioner Tyndale K.C. dismissed the petitioner's petition but made a decree of divorce against him on the ground of cruelty. The petitioner appealed.

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Colin Duncan for the petitioner.

Elliott Gorst for the respondent and co-respondent.

THE COURT OF APPEAL (Lord Greene M.R., Bucknill L.J. and Hodson J.) allowed the appeal and granted the petitioner a decree of divorce on the ground of the respondent's adultery with the co-respondent. The appeal was decided entirely on the facts and does not call for report except in regard to the effect of the stipendiary magistrate's conclusion in the court of summary jurisdiction on the issue of cruelty having regard to s. 6 of the Matrimonial Causes Act, 1937 (1).

Apr. 26. LORD GREENE M.R. in reading the judgment of the court said at its conclusion: "There remains to be considered the finding of the stipendiary magistrate in favour of the respondent on the issue of cruelty, which was substantially the same as that raised in the divorce proceedings. Prima facie, the parties would be estopped. In divorce cases, for special reasons, as explained by Fletcher Moulton L.J. in *Harriman v. Harriman* (2), no estoppel is created. There may, however, be something less than an estoppel, that is to say, the findings may be treated as of strong probative value. Section 6 of the Matrimonial Causes Act, 1937, must be considered in this connexion. The respondent having obtained an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, on the ground of cruelty, the court may

(1) By the Matrimonial Causes Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 57), s. 6, sub-s. 1: "A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce by reason only that the petitioner has at any time been granted a judicial separation or an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, upon the same or substantially the same facts as

"those proved in support of the petition for divorce."

Sub-section 2: "On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion or other grounds on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner."

(2) [1909] P. 123.

treat the order as sufficient evidence of cruelty under s. 6, sub-s. 2. The same sub-section provides that the court shall not pronounce a decree without receiving evidence from the petitioner. In our opinion the evidence of the petitioner referred to in this sub-section is intended to relate to evidence directed to the main issue in the case, and is not confined to such matters as absolute and discretionary bars to a decree of divorce. There is nothing in the wording of the sub-section to constrain the court to limit the meaning of the word "evidence" within such narrow bounds, and the evidence of the parties at the trial was, in our opinion, rightly directed to the charges which had already been the subject matter of proceedings in the magistrate's court. A finding of a court of summary jurisdiction against one of the parties to a divorce suit who is accused of a matrimonial offence may be admitted as evidence that he or she has committed the offence charged, but, in our opinion, this does not absolve the court from examining the evidence given at the trial upon the issues there raised.

In the result, notwithstanding the decision of the stipendiary magistrate, the charge of cruelty is not proved to our satisfaction and the findings of the learned commissioner on this issue must also be reversed.

Appeal allowed.

Apr. 27. The question as to costs was separately argued.

Elliott Gorst for the respondent. When a wife has been successful in divorce proceedings in a court of first instance but fails in the Court of Appeal, she will none the less be entitled to her costs as against the husband: *Holt v. Holt* (1); *Otway v. Otway* (2); *Earnshaw v. Earnshaw* (3). There is a well settled rule of practice to this effect which the court should follow: 10 Halsbury's Laws of England, 2nd ed., p. 851.

James Campbell (*Colin Duncan* with him) for the petitioner. While the general practice is to allow the wife her costs, the court has a discretion to be exercised in the light of the special circumstances. Here the respondent did not ask for security for costs in the court of first instance which indicates that she had means of her own available for the purpose of those proceedings. It is true that she asked for and obtained security in this court. Apart from these considerations there are circumstances in connexion with the unsatisfactory

(1) (1858) 28 L. J. (P. & M.) 12. (3) [1896] P. 160.

(2) (1888) 13 P. D. 141.

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C. A. evidence of the respondent disentitling her to costs : *Jackson v. Jackson* (1). If however the petitioner were ordered to pay the respondent's costs he should be enabled to recover them from the co-respondent. *Darnborough v. Darnborough and Smith* (2).
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 HOLMAN. *Elliott Gorst* replied and referred to *Robertson v. Robertson* (3).

THE COURT then made the order as to costs stated in the judgment of Hodson J., but reserved judgment for the purpose of stating their reasons.

MAY 12. HODSON J. read the judgment of the court. In this case the order of the court has already been made directing the co-respondent to pay to the petitioner the costs of the proceedings, here and below, including the costs attributable to the allegation of cruelty made by the respondent against the petitioner. It was further ordered that the petitioner should pay to the respondent her costs in this court, not limited to the security ordered and that the petitioner should be at liberty to recover those costs from the co-respondent. It was further ordered that the order for costs against the petitioner in the court below be set aside. No order for costs was made, or sought, against the respondent.

It is desirable that some explanation should be given showing the reasons why this order was made in the exercise of the discretion of the court and to indicate certain considerations which may be of assistance generally in the exercise of discretion as to costs in matrimonial appeals. The suit was instituted by the husband petitioner for divorce on the ground of the alleged adultery of the wife respondent. Both respondent and co-respondent denied adultery by their answers and, in addition, the respondent made allegations of cruelty and claimed a divorce on that ground. The case came to trial without the respondent having obtained or asked for security for her costs. The petitioner failed on both issues and upon the prayer of the petition being rejected and a decree being pronounced in favour of the respondent, the petitioner was condemned in the costs of the respondent and of the co-respondent. On appeal the findings of the court below were reversed. We condemned the co-respondent in the costs of the allegations of cruelty on the ground that the history of the case showed

(1) [1924] P. 19 ; 40 T. L. R. 45. (3) (1881) 6 P. D. 119.

(2) (1926) 96 L. J. (P.) 24.

that his association and eventual adultery with the respondent were bound up with the matrimonial disputes from which the allegations of cruelty arose. In particular, he was closely concerned with the final act of cruelty relied upon and was a discredited witness called to support the respondent in respect of this final act. In this connexion the court was referred to a decision of Hill J. in *Darnborough v. Darnborough and Smith* (1) in which considerations of this kind actuated the learned judge to make a like order.

The respondent, though successful in the court below, was found on appeal to have succeeded wrongly and since she had not applied in that court for security and accordingly must be taken to have been in a position to litigate independently of her husband's resources, it was considered proper that the order for costs in her favour should be set aside as well as that which had been made in favour of the co-respondent. The position of a wife who obtains a decree and seeks to uphold her order in opposition to the husband's appeal has been considered in this court in *Otway v. Otway* (2) and there are statements in textbooks, e.g., Rayden on Divorce, 4th ed., p. 391, based on the decision in this case, to the effect that such a wife is entitled to defend herself and the husband must pay the costs of the appeal even if he succeeds. Similar language also appears in cases which have been heard before the Divisional Court on appeal from courts of summary jurisdiction, as for example, *Earnshaw v. Earnshaw* (3) and *Medway v. Medway* (4). In our view the proposition so stated is too wide and would appear to operate as a fetter on the exercise of the discretion which ought to be struck off. It remains true that the proposition enunciates an important consideration which commonly arises in matrimonial appeals.

The position of the wife in matrimonial litigation has developed from the days when, broadly speaking, she could hold no property independently of her husband and the decision in *Otway v. Otway* (2) decided in 1888 recognizes the possible effect of the Married Women's Property Act, 1882, on the position. The wife in that case had been married before the passing of the Act so that the question of the effect of the Act did not arise. The position at the present time is that, although some wives have independent means, a very large proportion are dependent on their husbands wholly or in part. The Act of 1882, therefore, does not affect the position of many

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(1) 96 L. J. (P.) 24.

(3) [1896] P. 160.

(2) 13 P. D. 141.

(4) [1900] P. 141.

C. A. litigant wives and it is necessary in the exercise of the discretion as to the costs of an unsuccessful wife, vis-à-vis her husband, to consider her means.

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In the present case the respondent wife obtained a limited order for security for costs of the appeal on the footing that she was without means to uphold the judgment in her favour and on the strength of an underestimate of the length of the hearing. Having obtained such an order for security on this basis and the hearing having lasted for longer than was expected this court has thought it fit in the circumstances of this particular case to order the petitioner husband to pay her the whole costs of the appeal, with a remedy over against the co-respondent. That the wife should be able to defend her position in the Court of Appeal and the amount of her means are not the only considerations which in our view should affect the mind of the court in the exercise of its discretion. There are other considerations which might properly be taken into account such as: (1.) The desirability of enabling a wife to litigate a reasonable case, (2.) The importance of a point of law raised and decided, (3.) The fact that a wife has manifestly committed perjury, (4.) The discouragement of speculative actions, (5.) The misconduct of the wife, or her advisers, in respect of the litigation.

Finally we would emphasize that, in making the above suggestions, we have no intention of limiting the discretion of the court as defined by s. 50 of the Judicature Act, 1925.

Solicitors: *Frank, Charlesly & Leighton; J. C. Clifford Watts.*

H. C. G.

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Feb. 24, 25.

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Divorce — Estoppel — Finding of cruelty by justices upheld on appeal to Divisional Court — Subsequent petition for divorce based on same cruelty — Respondent not estopped from denying cruelty — Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), ss. 29–31 — Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 178 — Matrimonial Causes Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 57), ss. 4, 6.

In support of a petition for divorce based upon the same facts, it is not sufficient merely to rely upon a previous conviction of a

[This case came before Lord Merriman P. at the Leeds Assizes and has been reported at his request, with the courteous assistance of counsel engaged in the case.]

particular offence in a court of summary jurisdiction even though that conviction may have been upheld on an appeal to the Divisional Court. In the Divorce Court the matter is not concluded *per rem judicatam*; and no doctrine of estoppel can operate against a party so as to abrogate the statutory duty of the court to inquire into the truth of a petition which is properly before it.

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DEFENDED PETITION for divorce: preliminary issue as to estoppel.

This was a wife's petition for dissolution of marriage on the ground that her husband had since the celebration of marriage treated her with cruelty. By his answer the husband denied cruelty and alleged that the petitioner had committed adultery with one Exelby, the party cited; by her reply the wife denied the adultery and alleged that the respondent was estopped from denying the cruelty because of a decision of a court of summary jurisdiction sitting at Otley in the county of York on November 26, 1946. That decision had been affirmed when the husband appealed to the Divisional Court (Lord Merriman P. and Jones J.) against the order on January 22, 1947 (1). The magistrates had made their order on the ground of persistent cruelty.

The President indicated that having already expressed his opinions on the merits of the case in the Divisional Court he would limit himself to deciding the preliminary issue as to estoppel.

Ernest Ould for the petitioner. There is estoppel *inter partes* in this case, the Divisional Court having found cruelty proved on the evidence before the magistrates. It is the duty of the court to be satisfied on the evidence that the case of cruelty has been made out; but the respondent is debarred from challenging facts already accepted by the court. Estoppel is however to be distinguished from *res judicata*, and it is for the court to decide whether the legal effect of the facts amounts to cruelty, or whether there are other matters which would prevent a decree being granted upon facts which would otherwise be unchallengeable.

[THE PRESIDENT referred to the duty of the court imposed on it by s. 6 of the Matrimonial Causes Act, 1937, which was drafted with *Harriman v. Harriman* (2) in mind. His Lordship also referred to the power of the court to cross-examine a petitioner by the King's Proctor.]

(1) [1947] W. N. 100.

(2) [1909] P. 123.

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Quintin Hogg and G. F. Leslie for the respondent. The court is being asked to abrogate its statutory duty. See ss. 4 and 6 of the Matrimonial Causes Act, 1937 (1). Section 6 cannot mean that the respondent is estopped from giving

(1) The Matrimonial Causes Act, 1937, s. 4 : " The following section " shall be substituted for s. 178 " of the principal Act: 178—(1.) On " a petition for divorce it shall " be the duty of the court to " inquire, so far as it reasonably " can, into the facts alleged and " whether there has been any " connivance or condonation on " the part of the petitioner and " whether any collusion exists " between the parties and also to " inquire into any counter charge " which is made against the " petitioner.

" (2.) If the court is satisfied on " the evidence that—

" (i) the case for the petition " has been proved ; and

" (ii) where the ground of the " petition is adultery, the " petitioner has not in any manner " been accessory to, or connived " at, or condoned the adultery, " or where the ground of the " petition is cruelty the peti- " tioner has not in any manner " condoned the cruelty ; and

" (iii) the petition is not pre- " sented or prosecuted in collusion " with the respondent or either " of the respondents ; the court " shall pronounce a decree of " divorce, but if the court is not " satisfied with respect to any of " the aforesaid matters, it shall " dismiss the petition :

" Provided that the court shall " not be bound to pronounce a " decree of divorce and may dis- " miss the petition if it finds that " the petitioner has during the " marriage been guilty of adultery " or if, in the opinion of the court, " the petitioner has been guilty—

" (a) of unreasonable delay in " presenting or prosecuting the " petition ; or

" (b) of cruelty towards the " other party to the marriage ; or

" (c) where the ground of the " petition is adultery or cruelty, " of having without reasonable " excuse deserted, or having with- " out reasonable excuse wilfully " separated himself or herself from, " the other party before the " adultery or cruelty complained " of ; or

" (d) where the ground of the " petition is adultery or unsound- " ness of mind or desertion, of " such wilful neglect or misconduct " as has conduced to the adultery " or unsoundness of mind or " desertion."

Section 6 : " (1) A person shall " not be prevented from pre- " senting a petition for divorce, " or the court from pronouncing a " decree of divorce, by reason only " that the petitioner has at any " time been granted a judicial " separation or an order under the " Summary Jurisdiction (Separ- " ation and Maintenance) Acts, " 1895 to 1925, upon the same or " substantially the same facts as " those proved in support of the " petition for divorce.

" (2) On any such petition for " divorce, the court may treat the " decree of judicial separation or " the said order as sufficient proof " of the adultery, desertion, or " other ground on which it was " granted, but the court shall not " pronounce a decree of divorce " without receiving evidence from " the petitioner"

evidence or calling witnesses. He cannot be estopped from denying guilt, and questions which might arise where a charge is dismissed are not applicable. The Divisional Court did not make a finding on the facts, it merely dismissed the appeal; and no additional force was given to the justices' findings on the facts. The finding of an appellate tribunal on matters of fact created no greater estoppel than a finding in a lower court.

The statutory duty of the court would not be discharged if a respondent who desired to cross-examine, give evidence and call witnesses were not permitted to do so.

LORD MERRIMAN. This is a wife's petition for divorce on the grounds of cruelty. By his answer the husband denies cruelty, and makes a charge of adultery. The wife by her reply alleges that the husband is estopped from denying the cruelty because of a decision of the justices of the petty sessional division of Otley, which has been affirmed on the merits by a Divisional Court at which I was presiding. By that decision the husband was then found guilty of precisely the same course of cruelty as that which is now alleged.

My decision not to go into the merits of this case myself is accepted by both parties, but without prejudice to their asking me to decide the issue raised by the reply. I do not feel the same embarrassment on that matter; counsel have told me that they wished me to decide it, and I now propose to do so.

I will preface these observations with a statement of the practice of the Divisional Court in these matters which has invariably been followed ever since *Knott v. Knott* (1). It will be remembered that before that decision the Divisional Court had laid down, not so much as a matter of jurisdiction as of discretion, that justices, although their jurisdiction is statutory, and is unfettered by the fact that there may be concurrent jurisdiction in the Divorce Court, ought not to proceed to determine an issue when they know that the same issue is about to be determined on a petition in the High Court; and that advice has been loyally followed by courts of summary jurisdiction. Correspondingly, as was pointed out in *Knott v. Knott* (1), it was very inadvisable, when it was known that a petition for divorce was actually pending, that the Divisional Court itself should hear an appeal from the justices, and proceed to try the same issue as that which was about to be

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raised before a judge of the High Court on a petition for divorce merely on reading the notes of evidence and without having the advantage of hearing the witnesses. Down to the very latest reported expression of this rule of practice—*James v. James* (1)—we have never actually decided that a decision of the Divisional Court would affect an estoppel per rem judicatam, as, on a well-known authority which I will discuss in a moment, a decision of the magistrates plainly would not. I do not propose to attempt to resolve the doubt which I indicated in *James v. James* (1) whether there is or is not a distinction to be drawn between a judgment dismissing the cause of complaint and a judgment finding that the cause of complaint is true. I do not propose to deal in this case with the effect of the dismissal of the complaint because that point does not arise: what we are concerned with here is the effect on the trial of this divorce suit of a previous decision by the justices finding that the complaint is true, and the upholding of that decision by a judgment of the Divisional Court. It is sufficient to indicate that there may be a distinction between these two cases, for two, if not more, reasons. The first is that in *Harriman v. Harriman* (2) no doubt was expressed about the correctness of the decision in *Finney v. Finney* (3). That was a case in which a wife was precluded on a subsequent petition for divorce from including a charge of cruelty which had previously been found not to be proved, notwithstanding the fact that the charge of cruelty had formerly been made to support a petition for judicial separation only, whereas by her later petition she included a charge of adultery and a prayer for divorce. Secondly, it may well be that if the party is estopped by the earlier decision, the estoppel may operate to prevent that party from bringing the same charge at all before any other court, whereas the doctrine of estoppel will not operate so as to abrogate the statutory duty of the court to inquire into the truth of a petition which is properly before it. Thirdly, I need only add that the decision of the Divisional Court in *Pratt v. Pratt* (4), supports the view that an earlier dismissal of a charge may be conclusive. I leave the matter there.

That brings me back to the real point in this case, that is, the real effect of *Harriman v. Harriman* (2) on this plea of estoppel. There is only one general observation which I wish

(1) (1948) 92 S. J. 126 ; [1948]
2 All E. R. 214.

(2) [1909] P. 123.

(3) (1868) L. R. 1 P. & M. 483.

(4) (1927) 43 T. L. R. 523.

to make before quoting one or two passages from the judgments in *Harriman v. Harriman* (1). I agree with an observation which Mr. Hogg made in the course of his argument that strictly speaking the fact that this decision of the justices has been dealt with by the Divisional Court may be irrelevant in this sense, that the effect of producing an order of the justices based on a finding of cruelty would be exactly the same if the order was based upon a complaint which was undefended and went by default in the court of summary jurisdiction, as if it were made after a hotly defended case, every detail of which was fully examined by that tribunal; so I think that there is no distinction as regards the probative effect of an order on an undefended summons before justices and a decree of judicial separation pronounced by a judge of the High Court affirmed, it may be, by the Court of Appeal. But having said that, which is I think right as a matter of logic, I still think that assuming that there is no estoppel, and that it is merely a question of the weight to be attached to it, or, as it is sometimes called, the evidential value of the former judgment, a judge may well feel, for example, that a decision of the Court of Appeal affirming the finding of a judge of the High Court who has pronounced a decree of judicial separation, carries more weight than an order upon an undefended hearing before the justices. To put it in another way, the embarrassment which may be caused by an appellate tribunal proceeding to a decision when it is known that the same issue is to be tried by a judge is a real one, even if no question of estoppel is involved. As the result of this argument I do not at all recede from the view hitherto taken by the Divisional Court that that court should hold its hand when the same issue is ripe for trial before a judge of the High Court.

In considering *Harriman v. Harriman* (1) it is necessary to remember that two kinds of estoppel were set up, one of which was quite irrelevant to our present purpose, although it created some difficulty, whereas the other is directly in point. That which is irrelevant is the estoppel which, it was argued, resulted from the enactment in s. 5 (a) of the Summary Jurisdiction (Married Women) Act, 1895, that an order of the justices containing a non-cohabitation clause should "have the effect" "in all respects of a decree of judicial separation on the ground" "of cruelty." The wife's case in *Harriman v. Harriman* (1) was one of mere desertion uncomplicated by any cruelty.

(1) [1909] P. 123.

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The magistrate found that the desertion had been proved. After the lapse of two years the wife presented a petition for divorce in which she added a charge of adultery to the charge of desertion for two years. But the magistrate had included in the order made on the ground of desertion a non-cohabitation clause, and the Court of Appeal held that the desertion could not continue after the date of the order. To get over that difficulty it was said that the effect of the section already quoted was that, by the very effect of the non-cohabitation clause, the charge of desertion had been converted into a charge of cruelty and therefore the question of the duration of the desertion did not arise. That curious argument did not find much favour.

The other question of estoppel, which concerns us in this case, was whether, even if there had been a previous finding of cruelty by the magistrate, the judge hearing the petition would be bound to treat the matter as concluded. Upon that authority I think that it is quite easy to see how the present issue would have been decided. The relevant enactments at that time were ss. 29 to 31 of the Matrimonial Causes Act, 1857; but they were substantially to the same effect as s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925 as revised by s. 4 of the Matrimonial Causes Act, 1937.

I need only take a few passages from the judgments. Cozens-Hardy M.R. said (1): "What is the effect of a decree of judicial separation on the ground of cruelty? It has the same force and the same consequences as a divorce a mensa et thoro under the old law (ss. 7 and 16) and it makes the wife a feme sole so far as property and contract and suing and being sued are concerned (ss. 25 and 26). Beyond this it has no absolute effect. It may perhaps operate by way of estoppel inter partes, so as to prevent the husband from thereafter denying that he has been guilty of cruelty, though I desire to express no opinion on that point. It cannot in any way estop the court. For the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied. The utmost effect by way of estoppel which the order of March, 1906, can have is to prove desertion at that date, but not desertion for two years. If the order had been made on complaint of cruelty, and it had been adjudged that the

(1) [1909] P. 123, 131.

"matter of the complaint was true, the Divorce Court might perhaps have granted a divorce on proof of subsequent adultery." The point of the last sentence, as is plain from the argument, is that at that time the general practice—but it was no more than a practice—of the Divorce Court was to accept the production of a decree for judicial separation on the ground of cruelty as proof of the charge on which it was based, but although the Court of Appeal did not dissent from the propriety of that practice, while at the same time holding that the matter was not concluded by the former decision, we are governed to-day by s. 6 of the Matrimonial Causes Act, 1937, a section which was drafted with *Harriman v. Harriman* (1) in mind. I will return to this point later.

I propose to refer next to the well known passage in the judgment of Fletcher Moulton L.J. After referring to s. 5 (a) of the Summary Jurisdiction (Married Women) Act, 1895, and saying that the court was not asked in the case before it to reject the non-cohabitation clause as an inconsistency, Fletcher Moulton L.J. continued (2): "If we do not do this (i.e., reject the clause) we are bound loyally to obey the provisions of the Act by giving to this separation order the effect in every respect of a decree of judicial separation on the ground of cruelty, and to look upon it as creating an estoppel between the parties as to the husband having been guilty of this offence to the same extent as a decree granted by the Divorce Court would do By s. 31 of the Matrimonial Causes Act, 1857, the relief is made dependent on the court being satisfied on the evidence that the case of the petitioner has been proved. 'Proved' here means proved as a fact, and not merely proved inter partes. Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them. Hence the production of a decree for a judicial separation on the ground of cruelty is not as a matter of law sufficient to make it the judicial duty of the court to accept as a fact that the respondent has been guilty of such cruelty: and if the circumstances under which the decree was obtained are such as to raise a doubt in the mind of the court as to whether the cruelty was in fact committed, it would be entitled and bound to require such additional evidence as should be sufficient to convince it of the fact. But although this is so, the respect paid to a

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(1) [1909] P. 123.

(2) Ibid. 141.

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“ judicial determination of a fact between parties (which in civil actions is evidenced by its creating a binding estoppel) would, I should presume, in ordinary cases lead the court to consider the fact of the cruelty to be adequately established by the production of the decree.”

Farwell L.J. says (1) : “ If such a decree is available at all ” —that is the decree for judicial separation—“ it is by virtue of the ordinary rules of evidence. I do not doubt that as between the parties the ordinary doctrine of estoppel applies, as was held by the Judge Ordinary in *Finney v. Finney* (2), but estoppel is only a rule of evidence, and the duty imposed on the judge by s. 29, which emphasizes by express enactment the necessity for the court being satisfied as required by s. 31 is not restricted by any such rule. Neither the consent nor the admission of the parties justifies the court in granting a decree, although such consent or admission is acted on continually in ordinary civil suits, and, by parity of reasoning ” — I call attention to those words “ by parity of reasoning ” —“ no rule of evidence which prevents a party as against the other litigant from giving evidence of the truth can bind the court to shut its eyes, if it is not satisfied that all the truth is before it. It is plain that the King’s Proctor, if he intervenes, can give evidence to shew that the decree for judicial separation (on the hearing of which he had no power to intervene) was improperly obtained, if it forms one of the grounds on which divorce is asked, and that he or any other person intervening between the decree nisi and the decree absolute can do the same ; and it would be strange if the court cannot mero motu declare that it is not satisfied by the former decree, even although it may, as a general rule, think fit to act on it : the court is at liberty, but is not bound, to accept it.” Later, Farwell L.J. says (3) : “ In my opinion Bucknill J. was right in refusing to accept this order as evidence of cruelty ; it is apparent on the face of it the the cruelty was not alleged or proved, and in my opinion he would have been free to require evidence of cruelty, even if the order had found cruelty on the face of it, if in the exercise of his duty under s. 29 he thought right to do so.” In my opinion, the result is that it is plain, at any rate in a case in which it is sought to rely on a previous conviction of a particular offence in support of a petition for divorce based on the same facts, that the matter is not concluded per rem judicatam.

(1) [1909] P. 123, 144.

(2) L. R. 1 P. & M. 483.

(3) [1909] P. 123, 146.

It is asked, however, how this authority is to be applied, since the only result of the passages which have been read is that while the party is estopped the court is obliged to satisfy itself. It is suggested that, even if the respondent is entitled to file an answer, as he clearly must be until the question of estoppel is pleaded, he cannot be allowed to contest the effect of the earlier judgment. That means that although the party is there with his counsel and his witnesses the court is obliged to treat the case as an undefended one, and make such inquiries as it can by reason of the duty imposed on it without the assistance of cross-examination or the calling of witnesses for the respondent. I must say that it seems to me that that would be an extraordinary result of this legislation. Having asked the petitioner a few questions, the judge could not be prevented from calling the witnesses if he knew that they were there. I cannot believe that Parliament meant to reduce this procedure to such a farce as is suggested by preventing the court assisting itself in the best way possible, that is by having the assistance of the person best qualified to assist it, namely the counsel who has to conduct the case on behalf of the other party. Having decided that the court is not bound to accept the earlier judgment as being conclusive of the commission of the offence charged, the only possible way to conduct the investigation is in my opinion in the usual way of a contest *inter partes*.

I was asked to give some general advice as to the way in which the wife in such circumstances could present her case. To my mind it is quite impossible for anyone to lay down any rule which would be of the slightest assistance because everything depends on the facts of the particular case, the extent to which the matter was investigated in the court below, and the parties present at the trial. So far as this case is concerned Mr. Hogg made it abundantly clear that he wished to fight the whole thing on the ground that the Divisional Court was misled by the evidence of the wife and her witnesses: Mr. Ould's course is also clear. I can only advise him to come prepared to prove his case in whatever way he thinks may be the most convincing; and it will be for the learned judge who hears this case to decide what form the trial should take. The only order, therefore, that I can make is that this case stands adjourned to the next assizes.

Solicitors: *R. A. C. Symes & Co., Scunthorpe; Eric Wolfe, Ilkley.*

J. B. G.

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June 14, 15.

Lord Merriman
P.,
Bucknill L.J.
and
Hodson J.

*Divorce — Desertion — Separation of spouses by compulsion —
Supervening animus deserendi.*

Desertion can commence whilst the spouses are living apart, the separation being by compulsion, e.g., by reason of imprisonment.

Where a de facto separation takes place without there being an animus deserendi, but that animus supervenes, desertion will begin from that moment, unless there is consent by the other spouse. And this is so where the de facto separation is compulsory, e.g., where, in the war, the enemy intern spouses in different camps who formerly shared the same bedroom in one camp. Just as desertion once commenced is not necessarily interrupted by subsequent compulsory separation, which would prevent the errant spouse from returning to cohabitation (see *Drew v. Drew* (1888) 13 P. D. 97), so where there is compulsory separation, but an animus deserendi, which can be proved, supervenes, there will be desertion.

The dictum of Lord Penzance in *Fitzgerald v. Fitzgerald* (1869) L. R. 1 P. & M. 694, 698: "No one can 'desert' who does not 'actively and wilfully bring to an end an existing state of cohabitation If the state of cohabitation has already ceased 'to exist, whether by the adverse act of husband or wife, or 'even by the mutual consent of both, 'desertion' in my judgment 'becomes from that moment impossible to either, at least until 'their common life and home have been resumed,'" is no longer law.

Pardy v. Pardy [1939] P. 288, and *Thomas v. Thomas* (1945) 62 T. L. R. 166, followed.

The Japanese interned English spouses in December, 1941, at a camp in Amoy, China, where they occupied twin beds in the same bedroom. In March, 1942, the wife formed a friendship with a Norwegian and from June, 1942, she refused to have intercourse with her husband, refused to perform wifely duties for him and spent all her available time, by day, with the Norwegian. In December, 1942, the wife told her husband that she would not change her attitude of antagonism to him unless he promised to commence divorce proceedings on their release. The husband refused to give the promise. There was no evidence that either spouse made any attempt to get leave to live separately. In June, 1943, the spouses were removed by the Japanese to Shanghai and each interned in a different camp. The wife was permitted to visit her husband once a year for a period of about twenty minutes. On her second visit, in March, 1944, she asked her husband if he had seen any lawyers in his camp about divorce. The husband replied in the negative and asked her directly whether she intended to marry the Norwegian. She replied that she did. On their release from captivity in August, 1945, the spouses travelled home separately to England, where the wife at an interview with the husband said she would not live with him any more but that if she changed her mind after the lapse of one year she would let

him know. She did not change her mind and the husband petitioned for divorce on the grounds of his wife's desertion for three years immediately preceding the date of the petition, which was undefended. At the trial counsel for the petitioner dated the inception of desertion from December, 1942, and, alternatively, from March, 1944.

Held that (1.) the wife did not desert her husband in December, 1942, since there was not then a de facto separation: the mere failure to render wifely duties could not constitute the fact of separation: and (2.) the wife deserted her husband in March, 1944, when her animus deserendi supervened on the de facto, though compulsory, separation.

Per BUCKNILL L.J. Although he did not want to say anything to indicate disagreement with the first proposition, if the spouse had any choice in the matter, yet if spouses were compelled by their gaolers to live in the same bedroom, the reasoning which prevented a spouse from establishing desertion, when they had voluntarily shared the same bedroom, seemed to him to disappear.

Decision of Mr. Commissioner Eddy reversed.

APPEAL from a decision of Mr. Commissioner Eddy, dismissing a petition by a husband against his wife, praying for the dissolution of his marriage on the ground that his wife had deserted him for upwards of three years immediately preceding the presentation of the petition on July 1, 1947. The wife did not defend the suit.

The parties, David William Beeken, an engineer, and Enid Dorothy Mallim Beeken were married on August 15, 1936, and there were no children of the marriage. By the evidence of the petitioner, which the commissioner accepted, in December, 1941, the spouses were living in Hong Kong when they were captured by the Japanese in a ship, when about to escape, and they were interned in a camp at Amoy in China. There were only three married couples in the camp and a number of men. There was communal feeding, so that the wife did no cooking. The husband and wife slept in the same bedroom on two single beds together. They were confined against their will and had nowhere else to go. In March, 1942, the wife became friendly with a Norwegian also interned at the camp. She gave him lessons in English and he gave them to her in Norwegian and the wife began to spend all her available time by day with the Norwegian. From about June, 1942, the wife refused to have intercourse with her husband. The husband's evidence was that the wife did everything to make him feel awkward. She would not mend his socks, but she knitted a pair of socks for the Norwegian. As regards work

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in the room they took turns in sweeping and dusting and bed-making. The husband asked his wife to make gloves for him, as there was a prospect of going north, but she refused. The husband had to make his own vests from a cotton sheet. In fact, she rendered him no wifely services, maintained an attitude of antagonism towards him and in December, 1942, she said that she would not change it unless he promised to commence divorce proceedings on their release, but the husband refused to give any such promise and protested against her conduct.

In June, 1943, the parties were removed to Shanghai, where they were interned in separate camps, and there they remained until their release in August, 1945. During the period at Shanghai the parties were allowed to write to each other once a month and permitted to see each other once a year for a visit of about twenty minutes duration and the wife visited the husband on two occasions in September, 1943, and in March, 1944. On the second visit it appeared from questions addressed by the Commissioner to the petitioner, after the close of his case, that the wife asked her husband if he had seen any lawyers in the camp about divorce. The husband said that he had not done so and he asked her directly if what she intended was to marry the Norwegian. She said that she did. The husband said that he hoped that "this would blow over" when he got home."

On their release in August, 1945, the parties went home separately to England. On arrival in England the husband received a letter from his wife in which she stated that he would be welcome at her parents' home in Sussex, but that she would not be present. The husband subsequently met his wife at her parents' home when she said that she would not live with him any more but that if she changed her mind after the lapse of a year she would let him know. At the end of the year the husband wrote to his wife, but she did not change her mind and the husband brought this petition. In February, 1946, the husband bought a house, hoping that this would be an inducement to his wife to come back to him ; but she would not even come to see the house.

Before the Commissioner, counsel for the husband submitted that desertion by the wife commenced in December, 1942, when she said : "I refuse to alter my attitude to you unless "you undertake to commence divorce proceedings." In the alternative he submitted that the desertion commenced in

March, 1944, when the wife asked her husband whether he had seen any lawyer in his camp about divorce and he asked her whether she intended to marry the Norwegian and the wife replied that she did.

The Commissioner citing *Weatherley v. Weatherley* (1) approving *Jackson v. Jackson* (2) said that no case had gone the length of deciding that a wife could desert her husband while continuing to share with him the same room. He said that he had fully considered the evidence of the husband which he accepted and in particular that as to the events at Amoy and the conversation between the parties at Shanghai in March, 1944. The petitioner had failed to satisfy him that the matters of which he complained constituted desertion within the meaning of the Matrimonial Causes Act, 1937, and he, therefore, dismissed the petition.

The petitioner appealed.

Neville Faulks for the appellant. There was here desertion on the part of the wife as from December, 1942. As Duke P. said in *Pulford v. Pulford* (3): "Desertion is not the withdrawal from a place, but from a state of things The law does not deal with the mere matter of place. What it seeks to enforce is the recognition and discharge of the common obligations of the married state." The facts here clearly show desertion on the part of the wife at Amoy—the association with the Norwegian, the refusal of the wife to have intercourse with her husband, the refusal to make or mend his clothes, her persistent attitude of hostility towards her husband and her refusal to alter it unless he promised her divorce on their release. See *Scotcher v. Scotcher* (4) where Willmer J. cited Hill J. in *Jackson v. Jackson* (2) as authority for the proposition that refusal of sexual intercourse, though insufficient by itself to constitute desertion, might in conjunction with other circumstances provide evidence from which an intention to desert might be inferred. Willmer J. in *Scotcher v. Scotcher* (4) pointed out that nothing which was said in *Weatherley v. Weatherley* (1) by the Court of Appeal threw doubt on the judgment of Hill J. in *Jackson v. Jackson* (2). There is no reason, in principle, why a wife should not desert her husband whilst continuing to share with him the same bedroom. No doubt the facts do not often show this state of affairs since

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| (1) (1946) 174 L. T. 346; [1947] | (3) [1923] P. 18, 21. |
| A. C. 628. | (4) [1947] P. 1. |
| (2) [1924] P. 19. | |

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such a situation as here existed does not often arise. The spouses here were imprisoned in the same room ; voluntary departure was not open to either spouse. Each case must be considered on its own facts to show whether there is de facto separation, i.e., from a state of things and not from a place. As Barnard J. said in *Shilston v. Shilston* (1) where the spouses lived in a five-roomed bungalow : " I have come to the " conclusion that it would be quite wrong to say desertion could " not take place because the house happened to be a five- " roomed bungalow. That would be differentiating between " people who could afford to live in bigger houses as against " those who have to live in smaller houses." It is clear that the only reason the wife did not leave her husband's room at Amoy was that the Japanese imprisoned her there and there would be no other place in a camp full of men where she could go. Alternatively, there was in any event desertion on the part of the wife, from March, 1944, when she declared to her husband at a time when the parties were living in separate camps, that she required a divorce and intended to marry the Norwegian. Here it is plain that there was (1.) de facto separation followed by (2.) an animus deserendi. The statement of Lord Penzance in *Fitzgerald v. Fitzgerald* (2) that " no one " can ' desert ' who does not actively and wilfully bring to an " end an existing state of cohabitation " is no longer law. See *Pardy v. Pardy* (3) and *Thomas v. Thomas* (4). In *Drew v. Drew* (5) Jeune P. held in a case where a husband had deserted his wife that the period of desertion continued whilst he served a sentence of penal servitude, though this would have prevented him, had he been minded to do so, from returning to his wife. So here, when there was compulsory separation and an animus deserendi supervened, there was desertion. As Lord Greene M.R. said in *Pardy v. Pardy* (6) : " A de facto separation " may take place without there being an animus deserendi, " but if that animus supervenes, desertion will begin from " that moment, unless, of course, there is consent by the " other spouse." The fact that in each case the separation is compulsory makes no difference in law. [He was stopped.] [*Wynne v. Wynne* (7), *Williams v. Williams* (8) were also cited.]

The respondent did not appear.

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| (1) (1945) 174 L. T. 105. | (5) (1888) 13 P. D. 97. |
| (2) (1869) L. R. 1 P. & M.
694, 698. | (6) [1939] P. 288, 301. |
| (3) [1939] P. 288. | (7) [1898] P. 18. |
| (4) (1945) 62 T. L. R. 166. | (8) (1864) 3 S. & T. 547. |

LORD MERRIMAN P. This is an appeal from a decision of Mr. Commissioner Eddy refusing to grant a decree nisi of divorce on a husband's petition alleging desertion for three years immediately preceding the date of the petition. The case originally presented to the Commissioner raised the question whether it was possible for the inception of the desertion to have occurred in December, 1942, when the wife said to the husband that she would not change her attitude to him, refusing him all wifely duties, unless he promised to commence divorce proceedings on their release at a time when the spouses were admittedly sharing a bedroom with two separate beds in a Japanese internment camp at Amoy. The appeal is said to have been brought to overrule the Commissioner's decision that desertion could not then be said to have commenced, because the fact of separation of the spouses was not established. That presentation of the case was rejected by the Commissioner and I think rightly. That case was unarguable. There was no evidence before the court that either spouse made any attempt to get leave to live in different conditions and it is impossible to contend that the mere failure to render wifely duties could constitute the fact of separation. I say no more about that part of the case.

But after the conclusion of the petitioner's case, the Commissioner questioned the husband about the time after June, 1943, when the spouses were interned in separate camps at Shanghai. The wife was allowed to visit her husband for a period of twenty minutes each year and in March, 1944, when she made one of these visits, she asked him whether he had seen any lawyers in his camp about the divorce. The husband said that he had not done so and asked her "point-blank" whether she intended to marry the Norwegian. The wife replied that she did. The husband said that he hoped that all this would "blow over," when they returned home. The wife evidently made it quite clear that she was not willing to change her mind and this she also did after the parties had returned to England. This evidence having been given the Commissioner asked counsel for the petitioner from what date he submitted the desertion began. Counsel answered from December, 1942, and alternatively, from March, 1944.

With the first question I have already dealt; but the further question arises whether since it is impossible to date the inception of the desertion from the time when the spouses were inhabiting this room together in Amoy, it is possible to date

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the inception of the desertion at any rate from the date of this interview between the spouses in March, 1944. The legal question involved may thus be stated: can the inception of desertion be dated from the time when the de facto separation of the spouses is due to compulsion? I deliberately use the word compulsion, because in this case there was compulsion which amounted to force majeure. But I am bound to say that, although the question of compulsion is one of degree, it is impossible, in my opinion, to draw any real distinction between such different degrees of compulsion as the exigencies of service in the forces, a business voyage which, for his livelihood, the husband is compelled to take and which involves the inability of his wife to accompany him, and a dozen other examples of compulsion, resulting in the separation of the spouses.

✓ It is well established that when once desertion has started, it is not necessarily interrupted because the intervention of compulsion or force majeure prevents the husband, physically, from returning to cohabitation, provided always that the intention to desert which by the hypothesis is assumed to have been already established is shown to continue, whether by positive evidence or by the absence of anything to negative the presumption that the desertion, once established, continues to run. But, although compulsion which is an obstacle to the return to cohabitation does not prevent a continuance of desertion, the question is whether there is any difference in the case where the inception of desertion occurs during the period of compulsory separation, that is where a compulsory separation has already occurred and the animus deserendi supervenes in the course of it. I do not ignore the point that desertion can be established apart altogether from the question of its duration and that at first sight it may appear a startling proposition that a spouse merely by writing a letter or by saying something in the course of a visit to the other spouse indicating the intention of desertion can effect the inception of desertion at a time when the spouses are separated by force majeure. But this only means that it is necessary to avoid confusion between the legal notion of desertion and the evidence required to establish it. As Sir Wilfrid Greene M.R., as he then was, said in *Pardy v. Pardy* (1) when he was dealing with a case where the original separation was due to the agreement of both spouses to live apart, without there being any

(1) [1939] P. 288, 303.

previous resumption of the common life, "in such a case the "burden of proving that the change"—the *animus deserendi*—"has taken place may not be easy to discharge; but this is "no reason for saying that the court must refuse to admit the "possibility."

In this case no difficulty arises as to the weight of evidence. The Commissioner has believed the account given by the husband. In my opinion he was abundantly justified in believing that account for when the moment of release came and the husband and wife were free to meet at a port and to travel home together, they did not do so. They travelled to England separately and the wife abstained from seeking any contact with her husband, the evidence being that she wrote to him making it quite clear that though he would be welcomed by her parents at their house in Sussex, she herself would not be present. Moreover, the husband proved that in order to make a resumption of cohabitation more attractive to his wife he bought a house as a residence, but that she refused even to go and look at it. There was a meeting between them at her parents' house, but the nearest she got to yielding to her husband's persuasion was to say that she would take a year to think it over. At the end of the year there was correspondence from which it was clear that the wife adhered to her determination. By the husband's evidence it appeared that even when the husband and wife were living in the same rooms in Amoy, the wife made her intention plain, stating in December, 1942, that she would not change her attitude unless the husband promised to commence divorce proceedings upon their release, the husband refusing to give any such promise. When the spouses were removed to different camps at Shanghai the wife again made her intention clear on her visit to him in March, 1944, asking him whether he had seen any lawyers in his camp about divorce and, when asked, stating that she intended to marry the Norwegian. Everything that happened afterwards confirms the view that on this occasion in March, 1944, the wife was not expressing some idle, passing fancy, but was expressing her settled determination. The question of weight of evidence is not here involved: the question before the court is one of law.

Fundamentally this case depends on the view now taken about the well known passage in the judgment of Lord Penzance in *Fitzgerald v. Fitzgerald* (1): "No one can 'desert' who does

(1) L. R. 1 P. & M. 694, 698.

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“not actively and wilfully bring to an end an existing state of cohabitation If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, ‘desertion’ in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed.” It that is the law to-day, then it is impossible for this petitioner to succeed. In my opinion it is not the law to-day. It was shown not to be the law in *Pardy v. Pardy* (2), where the original separation was consensual. It was also stated not to be the law by a divisional court consisting of Hodson J. and myself in *Thomas v. Thomas* (2) where the original separation was assumed to have been brought about by the wife’s own desertion, but the situation had since been reversed by the husband’s unjustified refusal of her offer to resume cohabitation.

In my view the time has come, if it did not come long ago, to say that the fetters imposed by that particular passage of Lord Penzance’s judgment in *Fitzgerald v. Fitzgerald* (3) no longer bind the court. I will content myself with citing one passage from the judgment of the Master of the Rolls in *Pardy v. Pardy* (4): “For the act of desertion both the factum of separation and the animus deserendi are required. A de facto separation may take place without there being an animus deserendi, but, if that animus supervenes, desertion will begin from that moment, unless, of course, there is consent by the other spouse. Thus a husband who leaves his wife for a business voyage may, nevertheless, become guilty of desertion without the necessity of a previous return. All that is required to establish desertion in such a case is the presence of a supervening animus deserendi.” In my opinion, there is no difference in law between the case where the compulsory separation of the spouses already exists at the time of the alleged inception of desertion and that where the compulsory separation of the spouses supervenes after desertion has been established. It must be remembered that a petitioner seeking divorce on the ground of desertion must establish that desertion has subsisted for the whole of the three years immediately preceding the date of the petition. If desertion cannot begin when the de facto separation is compulsory, because the mere fact of compulsion negatives the

(1) [1939] P. 288.

(3) L. R. 1 P. & M. 694, 698.

(2) (1945) 62 T. L. R. 166.

(4) [1939] P. 302.

possibility of desertion, why should not this also be true if, after desertion has been established, compulsion supervenes to prevent the deserting spouse from returning to cohabitation? It has long been established that in such circumstances the supervening compulsory separation is no obstacle to the continuance of desertion for the necessary period. Sir Francis Jeune P. in *Drew v. Drew* (1) held that where a husband had deserted his wife the desertion continued whilst he was prevented by a sentence of penal servitude from returning to his wife. No doubt it may be more difficult to establish the inception of desertion at a time when the separation of the spouses is compulsory; but given satisfactory proof of the animus deserendi, as there was in this case, the true position in law is that desertion may commence during the compulsory separation.

For these reasons, I hold that the husband has established that at any rate from March, 1944—three years and three months before the date of the petition on July 1, 1947—his wife had deserted him. In my view this appeal should be allowed and a decree nisi pronounced.

BUCKNILL L.J. Apart from the fact that the husband and wife were compelled to sleep in the same bedroom I should have thought that the wife had committed the matrimonial offence of desertion which in its essence is the forsaking and abandonment by one spouse of the other, whilst the parties were still living at Amoy, at all events as from December, 1942, when the wife said to her husband that she refused to alter her attitude unless he undertook to commence divorce proceedings. The Commissioner has rejected the contention that desertion commenced at Amoy on the ground that no case has gone the length of deciding that a wife can desert her husband while continuing to share with him the same bedroom. I do not want to say anything which would seem to indicate any disagreement with that proposition, if the spouse had any choice in the matter. But, if spouses are compelled by their gaolers to live in the same bedroom, the reasoning which prevents a spouse from establishing desertion where they voluntarily share the same bedroom seems to me to disappear.

If the proof by the petitioner of desertion on the part of his wife in the camp at Amoy failed because the spouses were living in the same bedroom, that difficulty disappeared when in

(1) 13 P. D. 97.

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June, 1943, the Japanese removed them to Shanghai and confined them in different camps. From that time desertion was complete, because there existed not only the animus deserendi expressed clearly months before at Amoy but there was also at Shanghai a de facto separation, brought about, it is true, by compulsion, but nevertheless separation. In my opinion, therefore the husband in this case has established his right to a decree on the ground of desertion for more than three years immediately preceding the presentation of the petition. The appeal, therefore, should be allowed.

HODSON J. The case as first opened before the Commissioner and first argued before the court was different from the case on which, I think, he is entitled to succeed. The first case was that he had been deserted by his wife as from December, 1942, at a time when he and his wife were sharing the same bedroom in the prison camp. In my view the evidence tendered by the petitioner on that ground was not sufficient to justify a finding of fact that there was a de facto separation established at that time. To constitute the matrimonial offence of desertion there must be (1.) a de facto separation and (2.) an intention to desert. It is true that, whilst the spouses were still living together at Amoy in December, 1942, the wife did make a declaration of her intention to procure her freedom from her husband; but in my opinion there was no evidence sufficient to justify a finding that they were in fact living separately and apart. Their separation took place compulsorily in June, 1943, when they were removed by the Japanese from Amoy to Shanghai and interned by them in different camps. From that time the spouses lived apart and there was a de facto separation. This separation which is a condition of desertion, but which does not of itself establish desertion, may take place in more ways than one, either by compulsion or by service in His Majesty's forces or by a husband's obtaining employment in a country the climate of which is unsuitable for his wife or otherwise. In this case the separation was effected by the Japanese by compulsion. The position to-day, as I understand it, is that the court recognizes that though the separation between husband and wife may be brought about in one of these ways, the proof of the intention to desert may be adduced separately by means of declarations made subsequently to the separation, provided that they are shown to be against the will of the complaining spouse.

After the petitioner's case was closed the Commissioner by questions to the husband elicited that, when the parties were confined separately at Shanghai, they were allowed to visit one another once a year for a visit of about twenty minutes duration and that in March, 1944, the wife visited the husband and that then she asked him if he had seen any lawyers in the camp about the divorce which she had spoken of in December, 1942. The husband said that he had not and asked her if she intended to marry the Norwegian. The wife replied that she did. The husband replied that he still hoped all this would blow over when he got home, a wish that was not realized. The husband thus indicated that he was not accepting her declaration that she wanted to be free from him. That conversation, if it is true, showed that while the parties were in fact separated the wife was declaring an intention to desert—an intention which was against the wishes of her husband.

The evidence shows that this situation between the parties remained the same until the date of their release from captivity in August, 1945, and afterwards when they had both separately returned to England. By correspondence then between them it appeared that the wife refused to return to her husband against the wishes of her husband, so that the period of desertion was fully established from March, 1944, to July 1, 1947, the date of the petition, a period of more than three years. Counsel for the petitioner took advantage of that further evidence which had been elicited and when asked by the Commissioner from what date he submitted that the desertion commenced replied from December, 1942, when the wife said that she refused to alter her attitude to him unless he undertook to commence divorce proceedings and, alternatively, from March, 1944, when, as the Commissioner had elicited from the husband, his wife on a visit to him had asked him whether he had consulted lawyers about the divorce and stated that she intended to marry the Norwegian.

Unfortunately, the Commissioner never seems to have dealt with the contention that the desertion commenced in March, 1944, when this declaration of the wife was made. He referred to it in his judgment twice but on neither occasion did he give any reason for disposing of the argument that desertion could have taken place as from that time. It may be that he was subconsciously controlled by the dictum of Lord Penzance in *Fitzgerald v. Fitzgerald* (1) when he said: "If the state of

(1) L. R., 1 P. & M. 694, 698.

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"cohabitation has already ceased to exist, whether by the
 "adverse act of husband or wife, or even by the mutual consent
 "of both, 'desertion,' in my judgment, becomes from that
 "moment impossible to either, at least until their common life
 "and home have been resumed." If this dictum were still
 regarded as good law the Court of Appeal could not have
 arrived at their decision in *Pardy v. Pardy* (1). In that case
 the Master of the Rolls said (2): "For the act of desertion
 "both the factum of separation and the animus deserendi
 "are required. A de facto separation may take place without
 "there being an animus deserendi, but, if that animus super-
 "venes, desertion will begin from that moment, unless of
 "course, there is consent by the other spouse. Thus
 "a husband who leaves his wife for a business voyage may,
 "nevertheless, become guilty of desertion without the
 "necessity of a previous return." All these factors were present
 in this case. Desertion can commence whilst the spouses are
 living apart. In this case desertion was proved from March,
 1944, and, in my opinion, the appeal must be allowed.

Appeal allowed.

Decree nisi granted.

Solicitors for the appellant: *Coulson & Coulson.*

(1) [1939] P. 288.

(2) *Ibid.* 302.

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*Divorce — Practice — Service of petition — Acknowledgment of service
 — Proof of co-respondent's signature not necessary — Matrimonial
 Causes Rules, 1947 (St. R. & O. 1947, No. 523/L. 9), r. 8, sub-r. 2.*

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By r. 8 of the Matrimonial Causes Rules, 1947, "(1.) . . .
 "(a) a copy of every petition shall be served personally or by
 "registered post upon every respondent and co-respondent
 "named therein . . . (2.) For the purposes of the foregoing
 "paragraph of this rule a document shall be deemed to have been
 "duly served by registered post if the document is sent by pre-paid
 "registered post to the party to be served, and an acknowledgment
 "of service in accordance with Form 4 of his identity and of his

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

"receipt of the document is signed by him and returned to the solicitor for the petitioner, or to the petitioner if he is acting in person, at the address for service: Provided that where the party to be served is a respondent, his signature on the acknowledgement of service shall be proved at the trial or hearing."

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The word "respondent" in the proviso to r. 8, sub-r. 2, is to be read as exclusive of co-respondents, proof of whose signature on acknowledgments of service is accordingly not required. It is sufficient that an acknowledgment of service shall have been returned to the petitioner or his solicitor purporting to bear the signature of the co-respondent.

Appeal from Judge Stewart, sitting as a Commissioner of Divorce.

The appellant husband presented a petition for divorce on the ground of his wife's adultery with a named co-respondent. Neither the wife nor the co-respondent entered an appearance or took any part in the proceedings. The Commissioner found adultery proved. The wife had signed an acknowledgment of service, and her signature had been identified by the husband; but there was no proof of the identity of the signature of the co-respondent, from whom an acknowledgment of the service had also been received. The Commissioner, who stated that he and others had already experienced doubts about the matter, adhered to the opinion, which he had expressed on previous occasions, that he was not entitled to make an order for costs against the co-respondent in those circumstances.

The husband appealed.

Karminski K.C. and *Alastair Sharp* for the husband. The Commissioner was wrong in holding that the requirement in r. 8, sub-r. 2 of the rules of 1947 that the signature of a respondent on an acknowledgment of service must be proved applies to the signature of a co-respondent. Throughout the rules a distinction is drawn between a respondent and a co-respondent. The Commissioner's decision is based on the assumption that "respondent," in the rules, includes co-respondent. That the rules of 1947 clearly distinguish between the two appears from an examination of various of them, for example, r. 10, which concerns proof of service. In r. 5 it is provided that an alleged male adulterer is to be made a co-respondent to a husband's petition, whereas a woman named against whom costs are claimed a wife's petition is to be made a respondent to the petition. The two expressions appear

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together again in r. 7, sub-r. 1. [Section 177, sub-ss. 1 and 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, and r. 33 of the Rules of 1947 referred to.]

[LORD MERRIMAN P. Is there any use of the word "co-respondent" in the rules which could be taken to refer to anything but a male adulterer?]

No.

[BUCKNILL L.J. It cannot be sufficient to send a petition to a co-respondent at any address.]

The object of r. 8 is to ensure that the notice of a charge which is being made reaches the person being charged. No doubt, the mere obtaining of a signature purporting to be the co-respondent's would not, on ordinary principles, satisfy the court, but r. 8, sub-r. 2, it is submitted, by providing for proof of the signature of the respondent, is dispensing with such proof in the case of the co-respondent.

[BUCKNILL L.J. It would seem that a petitioner would have to satisfy the court that the petition had been sent to the co-respondent at an address where or from which he was likely to receive it.]

The co-respondent did not appear and was not represented.

LORD MERRIMAN P. [after stating the facts]: Until very recently a petition for divorce required personal service on both the respondent spouse and, among others, on any co-respondent. Among the procedural reforms which have resulted from recent inquiry into the practice and procedure of this Division, there has been added as an alternative to personal service, in the case both of a respondent spouse and of a co-respondent, service by registered post. That change was embodied in r. 8 of the Matrimonial Causes Rules, 1947. It is no part of our business to inquire whether the change of policy is wise. There can be no question that it was deliberate, and we have to give effect to and construe the rule in its present form. It reads as follows: "(1.) Unless otherwise directed—"
"(a) a copy of every petition shall be served personally or by registered post upon every respondent and co-respondent named therein Personal service shall in no case be effected by the petitioner. (2.) For the purposes of the foregoing paragraph of this rule a document shall be deemed to have been duly served by registered post if the document is sent by pre-paid registered post to the party to be served,

“ and an acknowledgment of service in accordance with Form 4
 “ of his identity and of his receipt of the document is signed
 “ by him and returned to the solicitor for the petitioner, or to
 “ the petitioner if he is acting in person, at the address for
 “ service : Provided that where the party to be served is a
 “ respondent, his signature on the acknowledgment of service
 “ shall be proved at the trial or hearing.” There follow two
 rules concerned with applications for leave to substitute for
 the modes of service prescribed by the foregoing paragraph
 some other mode of service. Suffice it to say that, though in
 ordinary circumstances service by registered post is a form of
 substituted service, for the purposes of this rule that form of
 substituted service which is by registered post is designated
 an alternative form of personal service.

It is quite clear, if r. 8, sub-s. 2, be read carefully, that there
 are several things on the face of it which appear to require strict
 proof : the registered letter has to be sent by pre-paid registered
 post to the party to be served. That, of course, implies not
 merely that his name is upon it, but that it is sent to such an
 address as enables the sending to be properly be described as
 sending it to him. Moreover, the document (called Form 4)
 to be enclosed with the petition, with the intention that
 it shall be sent back by the party thus to be served, contains
 two statements of fact, first, an acknowledgment that the
 person to whom the letter is addressed is the person named,
 in this case the co-respondent, and, secondly, that that person
 has received a copy of the petition. Thus, when the rule goes
 on to say that “ an acknowledgment of service in accordance
 “ with Form 4 of his identity and of his receipt of the document ”
 is to be signed by him and returned to the solicitor for the
 petitioner, it would seem to follow, if there were no qualifying
 clause, that it would be necessary to prove strictly that he had
 received the petition and signed the form ; but, by the proviso,
 “ where the party to be served is a respondent, his signature
 “ on the acknowledgment of service shall be proved at the
 “ trial or hearing.”

The short point is whether the word “ respondent ” includes
 a co-respondent ; for it is clear that the co-respondent’s
 signature to Form 4 was not proved at the trial. Our attention
 has been very carefully called to the contrasts and distinctions
 drawn in the rules between a respondent in the sense of a
 respondent spouse, on the one hand, and a respondent other

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First, it is important to consider the statutory provision which is the foundation of the obligation to make a male adulterer a party to the proceedings at all. That is s. 177, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, which reads: "On a petition for divorce presented by the husband or in the answer of a husband praying for divorce the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing." With that is to be contrasted sub-s. 2: "On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent." In other words, the male adulterer must be made a co-respondent, unless that is excused; the woman named need not be made a respondent unless the court so directs. It is from that section that the nomenclature in question is derived. A male adulterer is, so far as I know without any exception, in connexion with divorce procedure described as co-respondent, at any rate to an original petition.

It is well to consider some of the subsequent procedure, in order to see whether the same line of thought is carried on through the rules as appears in the provisions with regard to service. By r. 10: "Unless otherwise directed, and save where the provisions of r. 8, sub-r. 4, have been complied with"—that is, with regard to service by advertisement—"a petition shall not proceed to trial or hearing unless the respondent and every co-respondent thereto and every person named therein—(a) has entered an appearance; or (b) is shown by affidavit in a certain form to have been served with the petition personally or in accordance with an order for substituted service; or (c) has returned to the solicitor for the petitioner, or to the petitioner if he is acting in person, an acknowledgment of service in accordance with Form 4, which shall be lodged with the registrar." It is to be observed that even at that stage the same difficulty about establishing the identity of the person who returns the form occurs; but I think it reasonably clear that at that stage—the stage at which the registrar gives his certificate that the case is fit to be entered for trial—all that is required is that he should see that the respondent, or co-respondent, as the case

may be, has returned this form signed; for it will be remembered that it is not until the hearing—not at this preliminary stage before the registrar—that, in the case of the respondent, whatever that word may mean, actual proof of the signature on the acknowledgment of service is required.

I am deliberately omitting other rules from which the same implication can be drawn. Rule 14, relating to supplemental and amended petitions, by sub-r. 6, provides: “ Unless otherwise directed, a copy of the supplemental petition ”—which, of course, relates to charges which have arisen since the date of the original petition “ or of the amended petition ” concerned with the addition of charges antecedent to the date of the original petition “ together with a copy of the order (if any) made under this rule, shall be served upon the respondent, co-respondent or person named therein and, in the case of a respondent, co-respondent or person not named in the original petition, the supplemental petition or amended petition shall be accompanied by a notice to appear in accordance ” with the appropriate forms. There, again, the distinction is plainly drawn between the description “ respondent, co-respondent or person named.”

The same thing applies to the answer. When one of these persons has qualified to deliver an answer by appearing, his rights are described in these words in r. 16: “ A respondent, co-respondent or person named who has entered an appearance to a petition may, within fourteen days after the expiration of the time limited for the entry of such appearance, file an answer to the petition,” and so on.

Finally—for it is unnecessary to multiply instances—r. 33 is directly in point on the rights of the co-respondent in this case: “ After entering an appearance, a respondent or co-respondent may, without filing an answer, be heard in respect of any question as to costs or damages and a respondent spouse may, without filing answer, be heard as to any question of custody of or access to any children of the marriage” At first sight that rather suggests that it may be intended to draw a distinction for the purposes of this rule between a respondent and a respondent spouse, and that a “ respondent,” therefore, may include respondents other than respondent spouses; but the explanation of that distinction in this rule is, I think, that two distinct classes of relief are concerned, costs and damages on the one hand, and the question of custody or access to children on the other. Plainly, questions

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of custody and access affect only respondent spouses, and it is necessary, therefore, to distinguish, in connexion with custody and access, a respondent spouse from any more inclusive use of the word "respondent." That the word "respondent" in this rule does include a party other than the respondent spouse is shown by looking at r. 5, whereby "unless otherwise directed, where in a husband's petition there is a charge 'against a male adulterer, the alleged adulterer shall, if living' at the date of the filing of the petition, be made a co-respondent in the cause"—that is in accordance with s. 177 of the Act of 1925—"and where a wife's petition contains a 'claim for costs against a woman named she shall be made a 'respondent in the cause.'" It will be remembered that s. 177 gives power to the court to direct that the person with whom the husband is alleged to have committed adultery be made a respondent. This rule makes it obligatory in a case where there is a positive claim for costs against her.

Going back, therefore, to the wording of r. 33, it is plain that the word "respondent" where first used does not include only the respondent spouse, for it may also include a woman named against whom a claim for costs has been made, who is, therefore, entitled to be heard upon it, and who, by virtue of r. 5 and s. 177 of the Act of 1925, has become a respondent. There is, however, contrasted with those two alternative meanings of the word "respondent" the word "co-respondent." That embraces not only the question of costs but that of damages, for the co-respondent alone is the object of a claim for damages. That seems to show in the plainest way that throughout the rules a distinction is drawn between "respondent" and "co-respondent." Therefore, in r. 8, sub-r. 2, I read the word "respondent" in the proviso as exclusive of a co-respondent.

What, then, is the result? In the case of the respondent spouse there is the express requirement that the identity of the signature must be established at the trial. It seems to me that the only inference to be drawn from that is that in the case of the co-respondent that proof is not necessary. After all, this matter does not depend merely on the presumption that a registered letter shown to have been posted is *prima facie* evidence of its delivery to the person to whom it is addressed, a presumption which was, after consideration of the authorities, re-affirmed by Parker J., in *In re Struve's Trusts* (1). There

is more than that, for the registered envelope will contain two documents at least, the petition and the unsigned Form 4, the form acknowledging the identity of the recipient and the receipt of the petition. Somehow or other that document has come back to the petitioner or his solicitor, which means that the envelope has been opened, and the document signed, by somebody. I agree that, unless the wording of the rule leads to that conclusion, that would not ordinarily be sufficient to prove that the document had been signed by that person, but in my opinion that is exactly what this rule does provide. It is important to observe that for the purposes of rule 8 which provides by sub-r. 1 that service by registered post shall be an alternative to personal service, a document shall be deemed to have been duly served by registered post if the prescribed conditions are fulfilled. The condition in the proviso that it is only, as I think, in the case of the respondent that, over and above that, proof of signature is required at the trial or hearing tends irresistibly to the conclusion that that proof is not necessary in the case of a co-respondent.

There is no doubt, as my Brother BUCKNILL pointed out in the course of the argument, and as the Commissioner pointed out at the trial, that a heavy claim for damages may come to be decided on this evidence. At the moment, of course, we are only concerned with costs. By r. 33, sub-rr. 2 and 3, no bill of costs which is not directly referable to the decree nisi or the decree absolute shall be taxed against a co-respondent at all, if he has appeared, without giving notice, or, whether he has appeared or not, without giving him the right to apply to discharge the order. As I have said, we are not concerned with questions of policy, but solely with the interpretation of this rule. For these reasons I think that the Commissioner's decision that he had no jurisdiction to make an order for costs against the co-respondent was wrong, and must be reversed.

BUCKNILL L.J. I agree with what my Lord has said as to the meaning of the word "respondent" in the proviso to r. 8, sub-r. 2. It is quite clear it does not include a co-respondent. What was troubling the Commissioner was that, as he said, "there was no proof except that some person "had signed the name of Brooks." Of course that is true. As my Brother WYNN-PARRY pointed out in the course of the argument r. 8, sub-r. 2, must be read as if it included the following words, "and an acknowledgment of service in

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“accordance with Form 4 of his identity and of his receipt
“of the document *purporting to be signed by him* has been
“returned to the solicitor for the petitioner, or to the petitioner
“if he is acting in person, at the address for service.”

The commissioner was in error in reading that rule as if it were necessary that there should be proof of the co-respondent's signature before an order could be made against him for costs. In April, 1947, the co-respondent was a corporal in the army living at Otley in Yorkshire. The petition was sent to him at his private address, given by the wife as Council Bungalows, New Horton, near Mansfield. I have no doubt that in this particular case the co-respondent received the petition and signed Form 4. The registered package might, however, have arrived at his home address and been received by someone in the house. The postman does not require to be satisfied that the addressee of a registered package signs the receipt. It might have been opened, and, with the desire to avoid troubling the man abroad, Form 4 might have been signed by someone else. There may be a danger of that kind, but that is perhaps looking for trouble which has not yet arisen. The same thing applies in the case of r. 10. That rule must be read in this way: “a petition shall not proceed to trial or hearing unless “someone purporting to be the co-respondent has returned “to the petitioner or his solicitor an acknowledgment of service “in accordance with Form 4.” I think that the Commissioner put too strict an interpretation r. 8, sub-r. 2, and that the appeal must be allowed.

WYNN-PARRY J. I agree.

Appeal allowed.

Solicitors for the husband: *W. O. Nicholl, Law Society Services Divorce Dept., for F. H. G. Craze, Law Society Services Divorce Dept., Leeds.*

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Finnemore J.

Divorce — Nullity — Insistence by husband on practice of coitus interruptus—Whether wilful refusal to consummate the marriage—The nature of consummation—Decree of nullity.

The consummation of a marriage requires an act of sexual intercourse which is natural and complete. That requirement cannot be satisfied unless there is not only penetration but also emission within the body of the female.

If, therefore, a man who is able to perform the sexual functions of penetration and emission practices coitus interruptus against the wishes of his spouse, his conduct amounts to a wilful refusal to consummate the marriage.

The principles laid down by Dr. Lushington in *D. v. A.* (1845) 1 Rob. Ecc. 275 as to the true meaning of the term "sexual intercourse" considered and applied. *Baxter v. Baxter* [1948] A. C. 274 and *L. v. L.* (1922) 38 T. L. R. 697 distinguished.

WIFE'S UNDEFENDED PETITION for nullity of marriage on the ground that the respondent had wilfully refused to consummate the marriage. The only form of sexual intercourse which had taken place had been that of coitus interruptus.

D. Tolstoy for the petitioner. The House of Lords in *Baxter v. Baxter* (1) had left open the question whether the practice of coitus interruptus could amount to a wilful refusal to consummate a marriage. See judgment at p. 283. That case decided that the use of artificial means to avoid the natural consequences of sexual intercourse—namely, the procreation of children—did not prevent sexual intercourse from being natural and complete: but sexual intercourse is neither complete nor natural when coitus interruptus is practised.

It is submitted that emission is a necessary ingredient of sexual intercourse—see Bayle's Historical and Critical Dictionary, Beck's Medical Jurisprudence (1842), Chitty's Medical Jurisprudence. See also *Cowen v. Cowen* (2) and the first limb of the finding of the Court of Appeal in that case: "We are of the opinion that sexual intercourse cannot be said "to be complete when a husband deliberately discontinues the "act of intercourse before it has reached its natural termination." It is submitted that that proposition has not been overruled by *Baxter v. Baxter* (1).

(1) [1948] A. C. 274.

(2) [1946] P. 36, 40.

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Dr. Lushington had held in *D. v. A.* (1) that "if sexual intercourse was so imperfect as scarcely to be natural "it was no intercourse at all." That view was followed in *Snowman v. Snowman* (2), in which there had been no penetration and in which a decree of nullity was granted although there had been a fecundation ab extra. *L. v. L.* (3) was to be distinguished as in that case there had been both penetration and emission before withdrawal.

Dr. Lushington had said in *D. v. A.* (4) that one of the objects of matrimony was to prevent licentiousness, and that a malformation in the wife which caused an imperfect intercourse might cause the husband to seek an adulterous satisfaction. The form of sexual intercourse known as coitus interruptus was unnatural and might cause disgust to the wife. It was not accepted by normal standards as natural and complete intercourse, and it did not, it was submitted, come within the description in *Baxter v. Baxter* (5): "Parliament 'used the word 'consummate' as that word is understood in 'common parlance and in light of social conditions known to 'exist.'"

FINNEMORE J. This case raises a point of considerable interest which was deliberately left undecided by the House of Lords in *Baxter v. Baxter* (5), namely, whether a marriage is consummated when the practice of coitus interruptus has always been followed. The petitioner, Mrs. Grimes, is asking for a decree of nullity of her marriage with the respondent, Walter Robert Grimes, on the ground that he has wilfully refused to consummate the marriage. The parties went through a ceremony of marriage on September 21, 1946, and the facts, as I find them, are that from the first moment to the last the only sexual intercourse—a term I use neutrally for the moment—which in fact took place between the parties was that form of intercourse which is sometimes described as "coitus interruptus"; that is to say, on every occasion, and there were many, when there was intercourse between these two people the husband always withdrew before emission. The petitioner gave evidence that she objected from the beginning because she wanted to have children, and that her husband had told her that he did not want children, that there never would be any children, and that his mother had so advised him.

(1) (1845) 1 Rob. Ecc. 279.

(2) [1934] P. 186.

(3) (1922) 38 T. L. R. 697.

(4) 1 Rob. Ecc. 279, 298.

(5) [1948] A. C. 274, 290.

The two mothers appear to have taken part in the discussion when it was apparent, as it fairly soon was, that the young people were not getting on very happily together. The young lady's mother said that this was an unnatural way of living and could be injurious to health. The young man's mother said : " Nonsense " ; and added that she had advised him to do this and that he was going to do it. He continued to do it and refused to have intercourse in the normal way with his wife at any stage. Finally, the parties became estranged and, for some considerable time now, they do not appear even to have corresponded with each other. I am satisfied, beyond any question, on these facts. It is plain now, following *Baxter v. Baxter* (1), that if a husband and wife have sexual intercourse using a normal preventative in order to avoid conception, that is full sexual intercourse, and it results in the marriage being consummated. It has been argued in this case, however, that if the practice adopted is that of coitus interruptus, there is no proper intercourse and, therefore, no consummation of the marriage, quite irrespective of any question as to the possibility or otherwise of there being children.

I think that Mr. Tolstoy's argument for the petitioner can be stated quite simply and quite shortly, and it is this : In order that a marriage may be consummated there must be normal and full intercourse. It has been laid down by the House of Lords that there may be such normal and full intercourse although preventatives are used to prevent the arrival of children, but it has always been held, from the earliest days, that the intercourse, to establish consummation of marriage, must be natural and must be complete. There is no natural and no complete intercourse unless there is emission from the one into the body of the other ; therefore any practice of coitus interruptus does not merely prevent the procreation of children but it prevents any real intercourse at all. It therefore prevents consummation of marriage.

Mr. Tolstoy has cited a number of authorities, going back to the early part of the last century and, indeed, before the last century ; and he has said that it has always been held that there must be emission into the body of the female in order to create a consummation of a marriage. The real difficulty is that all these decisions were prior to 1937 and deal with matters of impotence and incapacity, for no one in those days had thought of wilful refusal as a ground for relief of this kind. I do not think that that alters the principle of the matter because

(1) [1948] A. C. 274.

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whether a man, under the old law, was unable to perform the sexual act, or whether, under the recent legislation, he refuses to perform the sexual act, the result is the same: there is no proper intercourse and, it is argued, no consummation.

Mr. Tolstoy started with the passage in Bayle's Historical and Critical Dictionary which deals with the old-fashioned methods of examination of the parties. It certainly says in terms that one of the things which the viewers have to look for is that emission which was a vital element in consummation—and one of the things they have to examine is where, what and what type of emission is produced. The passage is at p. 800 in vol. 4 and it says (inter alia) that the viewers must inform themselves "whether the intromission has been made; and also "an facta fit emissio, ubi, quid, et quale emissum." Counsel then referred to Beck's book of Medical Jurisprudence at p. 56; again suggesting that this emission is an essential part of intercourse: "The inability to propel the semen out of its "vessels is frequently to be considered as an absolute cause; "but generally it is a curable one." We are not concerned here with the medical side of the point and merely seek some further authority that emission is one of the qualities essential to a proper act of normal intercourse. Counsel further cited Chitty's Medical Jurisprudence at pp. 374 and 375: "It may "here suffice to observe, that imperfections constituting "impotency rarely occur, and that many supposed defects "may be removed by surgical operation. Impotency may "exist on the part of the man or of the woman, though in the "great majority of instances on record, it has been alleged "against the former; and though not a very frequent event in "either sex, is comparatively more rare in the female. In the "male it denotes an incapacity erectio ac intromissio penis cum "emissione seminis." That is laying down quite plainly that without penetration and emission there is incapacity and therefore, in those days, that there were grounds for alleging non-consummation owing to incapacity on the part of the man should he be unable to perform those necessary functions. It would follow, in my opinion, that if that be true, then under the new law, if the man, although he is able to perform those functions, wilfully refuses to perform them he is not performing the normal and full act of intercourse and therefore that he is not consummating the marriage.

I think perhaps the strongest case, and certainly the most famous one, that sums up all this matter is *D. v. A.* (1),

(1) 1 Rob. Ecc. 279.

in which in his well known judgment Dr. Lushington says (1) :
 “ I apprehend that we are all agreed that, in order to constitute
 “ the marriage bond between young persons, there must be
 “ the power, present or to come, of sexual intercourse. With-
 “ out that power neither of two principal ends of matrimony
 “ can be attained, namely, a lawful indulgence of the passions
 “ to prevent licentiousness, and the procreation of children,
 “ according to the evident design of Divine Providence.”
 Here Dr. Lushington is laying down two ends of matrimony.
 One is, of course, the procreation of children but the other is
 the providing of lawful and normal methods of people satisfying
 their sexual desires apart from licentiousness or indiscriminate
 intercourse with other people. The judgment continues :
 “ Though all are so far agreed, this unanimity of opinion does
 “ not remove the existing difficulty, for that difficulty lies in
 “ the meaning of the term ‘ sexual intercourse.’ How is it to
 “ be defined ? This is a most disgusting and painful inquiry
 “ but it cannot be avoided. Sexual intercourse, in the proper
 “ meaning of the term, is ordinary and complete intercourse ;
 “ it does not mean partial and imperfect intercourse : yet,
 “ I cannot go the length of saying every degree of imperfection
 “ would deprive it of its essential character. There must be
 “ degrees difficult to deal with ; but if so imperfect as scarcely
 “ to be natural, I should not hesitate to say that, legally
 “ speaking, it is no intercourse at all. I can never think that
 “ the true interest of society would be advanced by retaining
 “ within the marriage bonds parties driven to such disgusting
 “ practices. Certainly it would not tend to the prevention of
 “ adulterous intercourse, one of the greatest evils to be
 “ avoided.”

Dr. Lushington then draws a vital distinction between full
 intercourse, though malformation may make conception
 impossible, and incomplete intercourse and says (2) : “ If there
 “ is a reasonable probability that the lady can be made capable
 “ of a vera copula—of the natural sort of coitus, though without
 “ power of conception, I cannot pronounce this marriage void.
 “ If, on the contrary, she is not and cannot be made capable
 “ of more than an incipient, imperfect, and unnatural coitus,
 “ I would pronounce the marriage void.” Dr. Lushington
 then gives his reasons : “ In the case first supposed, the
 “ husband must submit to the misfortune of a barren wife, as
 “ much when the cause is visible and capable of being ascertained,
 “ as when it rests in undiscoverable and unascertained causes.

(1) 1 Rob. Ecc. 279, 298.

(2) Ibid. 299.

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"There is no justifiable motive for intercourse with other women in the one case more than in the other. But when the coitus itself is absolutely imperfect, and I must call it unnatural, there is not a natural indulgence of natural desire ; almost of necessity disgust is generated, and the probable consequences of other connexions with men of ordinary self control became almost certain. I am of the opinion that no man ought to be reduced to this state of quasi unnatural connexion and consequent temptation, and, therefore, I should hold the marriage void." It is argued in this case, that *Baxter v. Baxter* (1) falls into the first of these classes, i.e., a natural sort of coitus, though without power of conception, while the practice of coitus interruptus falls into the second class as incipient, imperfect, and unnatural. If Dr. Lushington's principles are applied to the facts of this case I think that it is right to say that there was never any natural or complete intercourse in the present case. Certainly there was no intercourse designed to give the proper satisfaction to the woman and no intercourse likely or designed to do either of the very things which Dr. Lushington lays down as essential to normal, natural, and complete intercourse and, therefore, to consummation.

What *Baxter v. Baxter* (1) says, as I understand it, is that where you have all the normal elements of sexual intercourse including emission and, consequently, satisfaction, the fact that there has been introduced an artificial preventative in order to stay the possible procreation of children does not prevent consummation of the marriage. It prevents the procreation of children but it is a form of intercourse which in these days ordinary people would accept as natural and complete and therefore it amounts to consummation ; a word to be understood, as the Lord Chancellor said in his speech (2), "in common parlance and in the light of social conditions known to exist." The point before me is whether coitus interruptus is a natural and complete intercourse. All the authorities that have been cited to me, going back a long time, plainly suggest that it is not a natural and complete intercourse because there must be emission within the body of the other spouse such as does not occur in a coitus interruptus. It is difficult to see how a coitus which is "interruptus" can be said to be complete.

The view of Dr. Lushington in *D. v. A.* (3) has been cited and approved more than once. It was referred to in

(1) [1948] A. C. 274.

(3) 1 Rob. Ecc. 279.

(2) Ibid. 290.

L. v. L. (1), a decision of Horridge J. That case was quite different from the present one on its facts. The wife, owing to an operation, was sterile, and it was sought by the husband to obtain a decree of nullity on that ground. It was rejected by the learned judge because sterility was no ground for nullity. The position was that the parties could perform the normal act of sexual intercourse which, under normal conditions, would result in the procreation of children, or might so result; and it was held that as the sexual act could be performed, the fact that it could not result in children because of the wife's condition was irrelevant and the husband's petition was rejected, Horridge J. accepting the very great opinion of Dr. Lushington on that point.

D. v. A. (2) was also referred to in *Snowman v. Snowman* (3) in which Bateson J. cited in his judgment the words of Dr. Lushington in *D. v. A.* (2), which I have already quoted: "There must be degrees difficult to deal with; but if (the intercourse is) so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all." *Snowman v. Snowman* (3) was, of course, also decided before the Matrimonial Causes Act, 1937; but I can see no difference in principle since that Act as to the meaning of "intercourse."

It is true that we are not dealing with a case where the respondent is incompetent or incapable, but where he has wilfully refused to perform a sexual act which is the full act of intercourse consummating the marriage. I have come to the conclusion that intercourse must equally be full and natural intercourse whether the case is one of incapacity or one of wilful refusal. I hold that coitus interruptus is not a full and natural intercourse, but, by its very nature, a partial and incomplete intercourse.

As I find on the facts that this husband always, and against the wishes of the wife, carried out this particular practice which prevented a normal, complete or natural intercourse, I am satisfied that the husband wilfully refused to consummate the marriage and that the wife is entitled to the relief for which she asks. I pronounce a decree of nullity accordingly.

Solicitor: *Seton Pollock, Law Society, Services Divorce Department.*

(1) (1922) 38 T. L. R. 697.

(2) 1 Rob. Ecc. 279, 298.

(3) [1934] P. 186.

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The consummation of a marriage does not depend upon the completion of the sexual act by the male within the body of the female. It is consummated when there is vera copula, and that complete conjunction of the male and female bodies occurs as soon as the male has achieved full entry and penetration. What follows goes merely to the likelihood or otherwise of conception, which is to be distinguished.

Once full entry and penetration have been achieved the marriage has, therefore, been consummated; and the practice of coitus interruptus against the wishes of a wife cannot amount to a wilful refusal by the husband to consummate the marriage.

Baxter v. Baxter [1948] A. C. 274, and the application therein of the principles enunciated in *D. v. A.* (1845) 1 Rob. Ecc. 279 (as followed and interpreted in *L. v. L.* (1922) 38 T. L. R. 697), concerning the distinction between a natural coitus and an act in which the possibility of conception is involved, considered and applied.

The persistent refusal by a husband to have intercourse other than by coitus interruptus may, however, cause injury to the health of the unwilling spouse, and in such a case that spouse will be entitled to a decree of divorce on the ground of cruelty.

Observations of Viscount Jowitt L.C. in *Baxter v. Baxter* [1948] A. C. 274, 290, as to contraceptive practices forming the background to some other claim for relief applied to the issue of cruelty.

DEFENDED PETITION for nullity of marriage or in the alternative for dissolution thereof.

By her petition, dated June, 1947 (which was therefore anterior in date to the decision of the House of Lords in *Baxter v. Baxter* (1)) Bertha Eva White (otherwise Berry) prayed for a decree of nullity on the ground that the respondent, George Bolton White, had wilfully refused to consummate the marriage. In the particulars of such refusal it was alleged that "the respondent wilfully refused to consummate the marriage by resorting to the practice of coitus interruptus on each and every occasion that intercourse took place" (such occasions being infrequent).

Consequent upon the said decision of the House of Lords

(1) [1948] A. C. 274.

the petition was amended in March, 1948, by the addition of an alternative plea, namely, that "the respondent has treated the petitioner with great unkindness and cruelty in that . . . he deliberately insisted on the practice of coitus interruptus in his sexual relations with her despite her protests and with a full knowledge that his persistence in such practice would and in fact did cause injury to her health."

The respondent's answer, and amended answer, consisted of a denial of each and every allegation, and there was no cross prayer for relief.

The marriage took place in 1937 when the parties were both young, and there was no separation due to active service during the war years. From 1943 onwards the petitioner had constant nervous trouble and had to visit hospital on more than one occasion. When in hospital in November, 1946, she finally decided not to return to the respondent; and thereafter there was no resumption of cohabitation.

Marshall Reynolds (*Cridlan* with him) for the respondent. The Lord Chancellor in his judgment in *Baxter v. Baxter* (1) stated: "Before examining that case (*Cowen v. Cowen* (2)) "I wish to make an observation on one practice referred to in this summary of facts, namely, that of withdrawal before emission, or coitus interruptus. This practice, as distinct from artificial methods of contraception, does not arise in the case before the House and I prefer to express no opinion about it." The question whether or no the practice of coitus interruptus amounts to a consummation of the marriage is therefore left open for decision; but in considering that matter *Baxter v. Baxter* (3) must be closely examined, and it is submitted that a study of the principles which were previously laid down, and which were affirmed and applied by the House of Lords, will provide authority for holding that coitus interruptus is in fact a consummation of the marriage. (*Baxter v. Baxter* (3) was read in full.) Consummation is therefore, it is submitted, a matter of vera copula, which is to be distinguished from an act which may result in procreation. See Dr. Lushington's judgment in *D. v. A.* (4). See also Lord Stair's *Institutions*, in which it is said that procreation is not an essential of marriage.

The practice of coitus interruptus, indeed, does not neces-

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(1) [1948] A. C. 274, 283.

(3) [1948] A. C. 274.

(2) [1946] P. 36.

(4) (1845) 1 Rob. Ecc. 279.

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sarily avoid the possibility of procreation where the spouses are normal, so that should coitus interruptus be held to be a ground for nullity, there might be children born of a marriage declared void for lack of consummation.

(Counsel then dealt with the issue of cruelty, submitting that the charge had not been made out in accordance with the well-known principles of the court where cruelty was alleged.)

Victor Williams for the petitioner. There was no consummation of the marriage as the act of sexual intercourse was never completed in the body of the petitioner. It was fair to infer from the specific exception by the House of Lords of coitus interruptus that *Baxter v. Baxter* (1) was not intended to be prayed in aid as authority for contending that by that practice a marriage might be consummated. Lord Stair's Institutions had been referred to ; but in the passage quoted by the House of Lords in *Baxter v. Baxter* (2) were the words : " the general end of the institution of marriage, is the solace " and satisfaction of man." Coitus interruptus was a practice which could not give solace or satisfaction to an unwilling spouse, for the act of coition was not completed either with or without the mechanical means of contraception with which the House of Lords were directly concerned. Indeed, in the present case the practice had caused serious nervous strain as borne out by ample medical evidence ; so serious that should it be held that this marriage was in fact consummated, it is submitted that there is abundant evidence on which the petitioner should be granted a decree on the ground of cruelty.

WILLMER J. summarized the pleadings and said that where there was a conflict of evidence he believed the wife petitioner. His Lordship continued : I can state the salient facts quite briefly. The parties were married, or went through a ceremony of marriage, in September, 1937. It is common ground that no intercourse at all took place for six months and that coitus interruptus took place about six months after the marriage. The wife's case is that thereafter, throughout the married life, intercourse was rarely resorted to, and that whenever it was resorted to it always took the form of coitus interruptus. She tackled her husband about this ; showed him quite plainly that she did not approve of it, and made it quite clear to him that she wanted children, but received an answer from him either that he did not want to risk children because he could

(1) [1948] A. C. 274.

(2) Ibid. 289.

not afford them, or that he was too tired. The respondent said that from time to time there was full intercourse between the parties, and that he sometimes indulged in coitus interruptus and sometimes had full intercourse. I accept the wife's version that throughout the married life the husband persistently followed this practice of coitus interruptus.

The petitioner was a woman of somewhat nervous disposition. She had had a nervous breakdown before marriage, and I think that there is no doubt, in view of the medical evidence which I have received, that the practice of coitus interruptus (which also deprived her, if not of the possibility, at least of the likelihood of having children, and therefore led to a certain amount of friction between the parties) had its effect upon the health of the wife, and in the later years of the marriage she was repeatedly having to go into hospital suffering from nervous complaints. The matter came to a head in the spring of 1946, when her own general practitioner, Dr. Maclean, thought that he ought to take a second opinion from a mental specialist. The petitioner was accordingly sent to visit Dr. Strauss, a specialist in nervous diseases, who has given evidence before me, and a copy of whose report, written at the time, is also before me. Dr. Maclean saw the respondent husband, and read extracts from this report to him, so that the husband could be left in no doubt of the view which had been taken—which was that it was his conduct, to a large extent, which had brought about the bad state of health of the wife. I have no doubt that the respondent fully understood exactly what the specialist had to say.

The first extract from Dr. Strauss's report is from part of the history of the case, and it reads as follows: "The marriage was disastrous from the start. Her husband was unwilling to have children; and coitus interruptus has been practised throughout marriage, so that Mrs. White has never had any satisfaction whatsoever from the sexual side of married life. In any case, sexual intercourse takes place very seldom—about once in two or three months, at the most." There is another passage in the report which is also material, and which was also read and explained to the husband. "Unless her husband can be persuaded to change his whole attitude, to cease the practice of coitus interruptus, to start a family—and much else, I do not see how psychotherapy can have any lasting effect. I leave you to judge whether Mr. White is capable of appreciating the situation and possesses the

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"goodwill to try and put it right. If you think that nothing
 "can be done along these lines, Mrs. White would be well
 "advised to separate from her husband and go and live with
 "one of her sisters."

It was in response to that paragraph of Dr. Strauss's report that Dr. Maclean, very properly in my view, thought it was his duty to interview the respondent and see what he could do. The interview resulted, in effect, in nothing. The doctor found the respondent was unco-operative and no improvement came of it; the respondent continued as before. A month later, in May, 1946, the petitioner again had to go to hospital. She was advised then not to go back to her husband, but against that advice she did so, and remained with him until she once more had to go into hospital in November, 1946. During the period between the visit to hospital in May and the time when she went to hospital again in November, the evidence is that there was no intercourse whatsoever. When she was in hospital in November, 1946, the petitioner made up her mind that she could not go back to the respondent again, and there has in fact been no cohabitation since that date.

In those circumstances, the points which I have to determine are, firstly, whether the petitioner is entitled to a decree of nullity on the ground of wilful refusal of the respondent to consummate the marriage, such non-consummation consisting of the practice which he followed of having only coitus interruptus and never complete intercourse. If I decide that in the affirmative the other question does not arise. If, on the other hand, I decide that there is no ground for a decree of nullity, then I must go on to consider whether the husband's practice of coitus interruptus, and his persistence in that practice, which he knew his wife resented and which he knew was undermining her health, is sufficient to constitute cruelty so as to entitle the wife to a decree of dissolution.

Let me deal with the question of nullity first. It is to my mind an extremely difficult question, as well as being one of extreme importance. It is a question which the House of Lords specifically left open for future decision when they had before them the case of *Baxter v. Baxter* (1). I shall have to refer to that case, and to the speech of the Lord Chancellor, because it appears to me that, notwithstanding the express reservation of this subject for future consideration, the House of Lords have, inferentially at any rate, decided the question

of principle which must, in my judgment, lie at the root of the question. Before I do that, however, I should refer to the fact that only two days ago Finnemore J. had before him a wife's undefended petition in the case of *Grimes (orse. Edwards) v. Grimes* (1), in which she prayed for a decree of nullity on the ground of wilful refusal, having regard to the fact that the husband had persisted, throughout the marriage, in coitus interruptus. In other words, the same ground was put forward in that case as has been put forward in this case.

That case was undefended; this case has been defended. But having accepted the evidence of the petitioner and rejected that of the respondent, I am really put in the same position, as far as the facts are concerned, as Finnemore J. in his case. I have, however, had the advantage of hearing argument on both sides in this case, and although I quite naturally pay the highest respect, and have the highest regard, for the view expressed by Finnemore J., I cannot, in the circumstances, regard his decision as one which is necessarily binding upon me, especially if I come to the conclusion, as I do, that the reasoning of the House of Lords in *Baxter v. Baxter* (2) must impel me to the contrary conclusion. I regret very much that, within two days, there should be contrary decisions on what appears to be the same point, but it only goes to emphasize what I said at the beginning, that this is an extremely difficult point which will at some stage have to be decided by a higher tribunal.

The reasons why I have come to a conclusion differing from that of Finnemore J.—that is to say, the conclusion that I cannot in this case pronounce a decree of nullity—are as follows: In *Baxter v. Baxter* (2) the House of Lords, quoting with approval both the decision and the reasoning of Dr. Lushington in *D. v. A.* (3), drew a distinction between conception on the one hand and mere coitus on the other. The case of *D. v. A.* (3) was not a case of wilful refusal (because it was decided many years before that was made a ground for nullity) but a case of incapacity. It was a husband's petition for nullity. It was proved that the wife was completely without a uterus, and that her vagina, instead of the normal dimensions, measured only some two inches. Dr. Lushington took the view—in which the House of Lords concurred—that the matter for decision was whether the malformation of the

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(1) Ante p. 323.

(3) 1 Rob. Ecc. 279.

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vagina was such as to render coitus impossible. The question whether conception was possible was in his view quite beside the point. Dr. Lushington actually went so far as to adjourn the case for further evidence on the question whether medical skill could do anything to cure the malformation of the wife's vagina.

In *Baxter v. Baxter* there occurs (1) this quotation from the judgment of Dr. Lushington in the case of *D. v. A.* (2): "In "one sense of the term, there can be no doubt—namely, that as "relates to conception, the malformation is incurable"—and I say again in parenthesis that in that case the wife had no uterus at all—"but it is to me doubtful whether they mean that "it is incurable as to the mere coitus. In this difference, "I think, lies the true distinction. If there be a reasonable "probability that the lady can be made capable of a vera "copula—of the natural sort of coitus, though without power "of conception—I cannot pronounce this marriage void. "If, on the contrary, she is not and cannot be made capable "of more than an incipient, imperfect and unnatural coitus, "I would pronounce the marriage void."

That is the end of the quotation from Dr. Lushington, and the Lord Chancellor goes on (1): "That means that had "Dr. Lushington been satisfied that the vagina could by natural "or artificial means have been extended by two inches or "thereabouts he would have been obliged to refuse a decree "on the ground that the wife was capable of vera copula, the "complete absence of the uterus notwithstanding."

The decision in *D. v. A.* (2) was followed, as the House of Lords pointed out, by Horridge J. in the later case of *L. v. L.* (3). The Lord Chancellor quotes (4) a passage from the judgment of Horridge J. in that case as follows: "Does "'a capability of consummation' mean penetration merely or "'penetration followed by fertility? The authorities cited in "'the footnote certainly speak of the procreation of children as "'being essential to marriage, but the question is whether they "'refer merely to the capacity to procreate, or to the capacity "'to do an act which usually results in procreation. The "'question would be of greater difficulty if it were not for the "'decision of Dr. Lushington in *D. v. A.* (2). In that case "'the respondent had no uterus and the vagina was very short.

(1) [1948] A. C. 274, 287.

(2) 1 Rob. Ecc. 279.

(3) (1922) 38 T. L. R. 697.

(4) [1948] A. C. 274, 288.

“ ‘ If Mr. Bayford’s argument were correct, counsel for the
 “ ‘ petitioner in that case would merely have had to prove that
 “ ‘ the respondent had no uterus ; but the question whether
 “ ‘ the possibility of partial penetration was a ground for
 “ ‘ refusing relief was there exhaustively considered, and the
 “ ‘ decision turned on the impossibility of complete penetration.
 “ ‘ All that inquiry would have been unnecessary if Mr. Bay-
 “ ‘ ford’s argument were sound, and in that sense the question
 “ ‘ was directly involved in the case, and I cannot regard
 “ ‘ Dr. Lushington’s opinion on this point as obiter ’ .”

That is the end of the quotation from Horridge J. The Lord Chancellor continues (1) : “ The learned judge then said that
 “ the passages to which I have already referred disposed of the
 “ husband’s case. I am in complete agreement with this
 “ judgment.”

There we have the House of Lords completely agreeing both with the decision and with the reasoning of Horridge J. in *L. v. L.* (2). The Lord Chancellor, in effect, sums up his decision and the decision of their Lordships, by quoting (3) a passage from Lord Stair’s *Institutions*, 1681 ed., book 1, tit. 4, para. 6, which, I may say, has been much relied upon by both sides in argument before me. The passage is this : “ So then, it is
 “ not the consent of marriage as it relateth to the procreation
 “ of children that is requisite ; for it may consist, though the
 “ woman be far beyond that date ; but it is the consent, whereby
 “ ariseth that conjugal society, which may have the conjunction
 “ of bodies as well as of minds, as the general end of the
 “ institution of marriage, is the solace and satisfaction of
 “ man.”

I should state that in the case before me there is evidence from Dr. McLean that, when coitus interruptus is practised, the possibility of conception none the less remains, and for this reason. According to him, many men do in fact have a small emission of semen before the main emission that follows upon the completion of the act. There is always the possibility, therefore, that from this minor preliminary emission conception may result. Dr. McLean in fact said that, speaking as a medical adviser, he would not recommend the practice of coitus interruptus as a means of birth control. That may or may not be of some materiality. It seems to me a significant piece of evidence, because if I came to the conclusion that in such

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circumstances a decree of nullity could be pronounced on the ground of non-consummation, one might get a very curious result. The marriage would be annulled on the supposed ground of non-consummation, notwithstanding the fact that the wife might have borne perhaps not one child but many children. It seems a curious position that that which might very well produce a child or children should at the same time be a reason for obtaining a decree of nullity on the ground of non-consummation.

Reverting to *Baxter v. Baxter* (1), it seems to me that if one looks at the principle underlying the decision of the House of Lords, they were drawing the same distinction as had been drawn in the earlier cases cited, between conception on the one hand and mere conjunction of bodies on the other. The question, therefore, is what is meant by this "conjunction of "bodies" or, to use the Latin phrase, *vera copula*. There is no question in this case but that full entry and penetration has been achieved. It is submitted on behalf of the wife that there is no *vera copula* unless there is not only full entry and penetration, but also completion of the act within the body of the woman, whether with or without the use of mechanical contraceptives. On the other hand, it is contended that there is a complete conjunction of bodies, a *vera copula*—which means literally "true conjunction"—as soon as full entry and penetration has been achieved. What follows goes merely to the likelihood or otherwise of conception.

In my judgment, the latter contention must be correct; it seems to me to follow from the reasoning of the House of Lords in *Baxter v. Baxter* (1). I find it quite impossible, having heard this matter fully argued before me, to say that this marriage has not been consummated. Much as I regret to arrive at a different view from my brother on this point, I feel bound to say that I cannot, in this case, pronounce a decree of nullity.

That makes it necessary for me to consider whether a case of cruelty has been made out. I introduce the discussion upon that by again referring to *Baxter v. Baxter* (1). In the concluding passage of his speech the Lord Chancellor says this (2): "I take the view that in this legislation Parliament used the "word 'consummate' as that word is understood in common "parlance and in light of social conditions known to exist, "and that the proper occasion for considering the subjects

(1) [1948] A. C. 274.

(2) Ibid. 290.

“ raised by this appeal is when the sexual life of the spouses,
 “ and the responsibility of either or both for a childless home,
 “ form the background to some other claim for relief.”

It seems to me that the House of Lords were there saying that questions arising out of imperfect intercourse of one sort or another may very well arise in connexion with allegations of cruelty ; similarly they may arise in desertion cases where matters of that sort are put forward by the opposite party as constituting reasonable cause ; and that in the view of the House of Lords is the proper place to consider sexual irregularities of the sort contemplated. What the House of Lords were saying in relation to intercourse with the use of contraceptives seems to me to apply equally to the case of coitus interruptus ; a proper place to consider the effect of that is in relation to claims that may be made for dissolution on the ground of cruelty or desertion.

My attention was drawn to the case of *Rice v. Raynold-Spring Rice* (1), which in fact followed very shortly after the decision of the House of Lords in *Baxter v. Baxter* (2). That was a case in which the Divisional Court, hearing an appeal from magistrates, came to the conclusion, in agreement with the view of the magistrates, that coitus interruptus, practised by one party against the will of the other, was a good ground for the other spouse separating from the offending party ; that is to say, was such as to constitute a good defence to a claim based upon desertion. In argument I asked counsel for the husband whether, on the basis of the facts as I have now found them, the wife would have a good defence if sued by the husband for desertion ; and, as I understood Mr. Marshall Reynolds, he was not prepared to contend that she would not. That, however, is not of course sufficient by itself to make out a case of cruelty, although it goes some way along the road.

But here I have, as it seems to me, all the necessary facts which would entitle me to pronounce a decree on the ground of cruelty. I have a course of conduct persisted in by the husband, notwithstanding the objection and repeated complaints of the wife. I have a course of conduct which, according to the medical evidence, is calculated to impair the health of a woman of nervous disposition such as the wife in the present case. I have a course of conduct which did in fact, according to the medical evidence, result in serious injury to the health

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(1) [1948] W. N. 50.

(2) [1948] A. C. 274.

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of the wife. There may well have been other causes contributing to the wife's breakdown in health. Her health did undoubtedly break down, but I am left in no doubt, having heard the wife's evidence and the medical evidence, that at any rate one of the potent factors contributing to the breakdown in health was the persistent refusal of the respondent to have full intercourse in the normal way. I am not saying by any means that the practice of coitus interruptus is a ground in every case for pronouncing a decree on the ground of cruelty. The evidence of the doctor which I have heard is that there are many cases, where the parties are a normal man and a normal woman, where it does no harm to either of the parties. But it is where you get a woman of a nervous disposition like this that the practice, as I understand it, may be most damaging to health. I feel that a husband must take his wife as he finds her, and if she is a woman of a type who needs the full and natural completion of the act, then to persist in withholding it from her, in the face of her repeated complaints and objections, is in itself an act of cruelty, of cold calculated cruelty; and if, as in this case, it does result in serious injury to health, or does contribute in marked degree to the breakdown of health of the other spouse, then in my judgment it is only right that this court should give relief.

Therefore, I come to the conclusion that in this case persistence in the practice of coitus interruptus, although it does not enable me to say that the marriage has never been consummated, is nevertheless a matter which merits the condemnation of the court, and is abundantly sufficient to entitle the petitioner to the alternative relief claimed. I therefore propose to reject the prayer for a decree of nullity, and to pronounce a decree nisi of dissolution on the alternative ground.

Solicitors: *Joynson Hicks & Co., for W. Davies & Son, Woking; J. Lilly & Co.*

J. B. G.

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Probate — Evidence — Admissibility — Proof of solicitor's deceased clerk — Firm concerned in anticipated probate action — Whether the clerk a "person interested" — Evidence Act, 1938 (1 & 2 Geo. 6, c. 28) s. 1, sub-ss. 1 and 3.

In considering the admissibility or otherwise of a statement as evidence consideration will be given to the character and subject matter of the proceeding and the relation thereto of the author of the statement. A servant of a company or firm is not necessarily to be treated in every case as "a person interested."

Plomien Fuel Economiser Co. Ltd. v. National Marketing Co. [1941] Ch. 248 distinguished.

A clerk employed by a firm of solicitors who were concerned in a contemplated probate action prepared and signed a statement of his evidence. He died before the trial of the action and at the trial it was sought to tender the statement in evidence under the provisions of the Evidence Act, 1938.

Held, that although he had a natural and proper interest in the success of the firm's clients the deceased was not "a person interested" and the statement was in consequence admissible.

During a probate action (the details of which are immaterial to this report) the question arose whether a certain statement was admissible under s. 1 of the Evidence Act, 1938 (1). The authenticity of the statement and the death of the author thereof were proved to the satisfaction of the court.

(1) The Evidence Act, 1938, s. 1, sub-s. 1: "In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say (i) if the maker of the statement either (a) had personal knowledge of the matters dealt with by the statement; or (b) where the document in question is or forms part of a record purporting to be a continuous record made the

"statement . . . in the performance of a duty . . . and (ii) if the maker of the statement is called as a witness in the proceedings:

"Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, . . ."

Sub-section 3: "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

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The defendant, Mr. Haslewood, was one of the executors of the will propounded by the defendants in their defence and counterclaim. At a time when it was anticipated that there might be proceedings in relation to the validity of one or other or both of the two wills which were later to become the subject of the action Mr. Symonds, a clerk employed in the firm of Messrs. Haslewood, Hare & Co., prepared a signed statement of the relevant evidence which he would be able to give. He died before the action came to trial; and the defendants tendered his statement in evidence. Objection was taken to its admissibility on the ground that the statement came within s. 1, sub-s. 3, of the Evidence Act, 1938, as one made by a "person interested" when proceedings were anticipated.

Cartwright Sharp K.C. and *Victor Russell* for the plaintiff.

S. E. Karminski K.C. and *C. A. Marshall-Reynolds* for the defendants.

WALLINGTON J. There is no doubt that although at the time when this document came into existence there was no proceeding that was pending, there were anticipations that there would be proceedings in relation to the validity of one or other or both of the two wills which are dealt with by the pleadings in this case. The question is whether or not Mr. Symonds was "a person interested"—which must mean either interested in the transaction or in the pending or anticipated proceedings, or both—within the meaning of s. 1, sub-s. 3, of the Evidence Act, 1938, under the provisions of which this document is tendered by Mr. Karminski as evidence in the case. If Mr. Symonds was interested, within the meaning of that sub-section, then this statement is not admissible as evidence; if he was not, then it is admissible.

Upon the question as to what is meant by the word "interested," two authorities have been cited. One is a decision of Morton J. (as he then was) in *Plomien Fuel Economiser Company, Ltd. v. National Marketing Company* (1). The issue there was whether a tester employed by a company to test certain apparatus sold by them, and who had signed a proof relating to relevant facts in a passing-off action, was "a person interested" within the meaning of this sub-section. The learned judge says (2): "In my view, 'a person

(1) [1941] Ch. 248.

(2) Ibid. 250.

" 'interested' within the meaning of this sub-section must, 'in the context, mean a person interested in the result of the 'proceedings 'pending or anticipated.' It seems to me that a 'useful test, though perhaps not the only one, is: was it 'better for Mr. Petrie"—he was the tester—"that the 'plaintiffs should succeed in the present action or was it a 'matter of indifference to him? "

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Pausing there, the test laid down by the learned judge would seem to be satisfied, if it could be shown that in any way financially or otherwise, it would be better for Mr. Petrie if his employers should succeed in the action; the result would then be that he was interested within the meaning of the sub-section. But the learned judge proceeds in this way (1): "Applying that test, was he a person interested? I do not 'know whether the salary paid to Mr. Petrie was quite 'irrespective of, or depended to some extent upon, the number 'of tests which he carried out for the plaintiff company; 'but it seems to me that it must be to the advantage of the 'plaintiffs' tester if they win this action instead of losing it."

That would seem to indicate that the learned judge, in using the words "to the advantage of the plaintiffs' tester," was thinking of a possible advantageous change in the amount of his salary. But he goes on: "The object of the action is to 'prevent the plaintiffs' trade being damaged by what they say 'are unfair acts on the part of the defendants and it seems to 'me that a man whose employment consists of testing the 'Plomien fuel economizers must be benefited if the plaintiffs 'prosper and fuel economizers are sold by them and tested by 'him in increasing numbers. The amount of his work is 'increased, and I suppose that it is reasonable to infer that his 'importance to the company is increased, so that possibly 'in time, if not immediately, his remuneration might be 'augmented. I think, therefore, that in this particular case, 'Mr. Petrie must be held to have been 'a person interested,' 'within the meaning of the sub-section, at the time when his 'proof was given and signed by him."

That appears to me to show that the view of the learned judge was that in some way, directly or indirectly, the financial position of the plaintiffs' tester would or might depend on the result of the proceedings, and in that sense, therefore, he would be "a person interested" in the result of the proceedings. The learned judge goes further, and says (1): "In the case of a

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" limited company, it would seem clear that every shareholder
 " is a person interested in the success of proceedings brought
 " by that company ; and so, I should think, is every director.
 " Whether every servant of the company in every set of circum-
 " stances is necessarily ' a person interested ' is not a matter on
 " which I have formed any concluded judgment. It may be
 " that there are circumstances in which it might be said that a
 " servant of the company was not ' a person interested.'
 " As to that, I express no opinion ; but I think that the general
 " intention of the section is that, if there is put in evidence a
 " statement to which, of course, no cross-examination can be
 " directed, it should be either one made at a time when
 " proceedings ' involving a dispute as to any fact which the
 " ' statement might tend to establish ' are not ' pending or
 " ' anticipated,' or one made by what I may conveniently
 " describe as an independent person." By the words " inde-
 " pendent person," I understand the learned judge to mean a
 person who is not interested in the result of the proceedings.
 It is plain that the learned judge was able to decide that
 particular case on the basis of an obvious possibility that
 Mr. Petrie's financial position would, or might, sooner or later
 be changed and that whether the change would be to his
 advantage or disadvantage would depend on the result of the
 proceedings. It is important to observe that in his observations
 Morton J. indicates that the particular " proceeding " was an
 action based upon alleged " passing-off " and alleged breach
 of contract in respect of the economizers which it was the duty
 of the tester (Mr. Petrie) to test, implying that in forming his
 view he had regard to the direct relation that thus existed
 between the tester and the subject matter of the " proceeding."

It follows that in every case the facts must be ascertained
 both as to the person whose statement it is sought to put
 in evidence and as to the character and subject matter of the
 " proceeding " and the relation of the person to the subject
 matter of the proceeding, in order to decide the question of
 admissibility. It may, indeed, in some cases be necessary to
 enter upon an even more extended inquiry.* In making these
 observations I desire only to make it clear that, in my opinion,
 it would be wrong to suppose that a servant of a company must
 be treated in every case as " a person interested." Morton J.
 expressly excludes any such implication from his judgment (1).
 If I may respectfully say so I would add that I entirely agree
 both with his conclusion and the reasons given for it.

(1) [1941] Ch. 248, 251.

X The other case which has been cited is *Holton v. Holton* (1). In that case a statement sought to be put in evidence was made by the mother of the petitioner and the sole question was whether she was a "person interested" within the meaning of the sub-section. Barnard J. ruled that she was not. It was not suggested in that case that the mother had any possible financial or other material interest in the result of the proceedings. It is plain that she only had what was described as an emotional or spiritual or sympathetic interest in the result of the proceedings; and the learned judge held that that interest was not one that was hit by the terms of this sub-section.

It was part of Mr. Cartwright Sharp's argument in the case before me that even in the case of an independent witness, judges would be reluctant to admit a proof of a witness, or proposed or possible witness, as distinct from a statement made at the time—which I understand to mean at the time when the transactions took place with which he deals in his proof or draft proof; and Mr. Cartwright Sharp argues that the effect of the judgment in *The Plomien Fuel Economiser Company Ltd. v. National Marketing Company* (2) is that an employee of a party, whose employment is concerned with the subject matter of the dispute, is "a person interested," and that it cannot, therefore, be received in evidence. He says that in no case—save perhaps in the case of an independent person—would it be right to admit the witness's proof, unless it consists of a statement made when proceedings were not anticipated. The whole of that argument, as I understand it, is founded on what is submitted to be the effect of Morton J.'s judgment in *The Plomien Fuel Economiser Company Ltd. v. National Marketing Company* (2). I have already dealt fully with that judgment and need not repeat what I have already said.

Y I have come to the conclusion that it would not be right to say that in every case there must be a probability or possibility of financial advantage or disadvantage resulting to the person whose statement is tendered, in order to make the statement inadmissible. That is clearly not the sole test. It is not impossible to imagine a number of circumstances, varying in different cases, in which there would or might be an interest in the result of the proceedings, although it might not be

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(1) [1946] W. N. 208; 62 T. L. R. 683.

(2) [1941] Ch. 248.

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directly or indirectly a financial interest ; and therefore anything that I say in this case must not be taken as indicating the view—because it certainly is not my view—that unless there is a financial interest, direct or indirect, a statement of this kind, when tendered, is admissible.

There is no doubt that Mr. Symonds, if he had looked forward to the anticipated proceedings and had contemplated the end of the proceedings, would have preferred that his clients should succeed, rather than that they should fail. Mr. Karminski rightly says that Mr. Symonds had been for many years conveyancing clerk in the service of Messrs. Haslewood, Hare & Co., and he would not be likely, therefore, in that capacity, to come into contact with litigious matters—except perhaps in cases raising questions of title, and in the Chancery Division and an action such as the present ; but it is plain that, with regard to this matter, he was closely connected with it. He had taken a direct professional interest in the matters relating to the will of 1941 ; he had been concerned with the unfortunate family quarrels that appear to have taken place at some points of time ; he had been concerned with the power of attorney of April, 1941 ; and he was obviously preparing the statement, with a view to his appearance as a witness in proceedings as to the effectiveness of one or other of these testamentary documents.

There is no doubt, that Messrs. Haslewood, Hare & Co., acting for the defendants, were interested at the time when this statement came into existence, in the sense that it would be their wish that everything proper should be done in order to secure the victory of their clients in any proceedings that were then anticipated, and I suppose that Mr. Herbert Dering Haslewood, partner in that firm and one of the two defendants—who is, with Mr. James Henry Eggins, one of the executors of the will that is propounded by the defendants in their defence and counterclaim—would no doubt wish that any such proceedings should result in the success of endeavours to support the will for which they were responsible, or for which they, through their solicitors, were responsible. I suppose that in every case, where servants of the firm are loyal and industrious, they always do their very best within the strict limits of propriety and probity to secure the best results they can obtain on behalf of their firm. But I have to ask myself, whether that interest—a very natural and proper interest—is of the character intended to be included in the provisions

of this sub-section ; and I do not find myself able so to hold. I think that it is an interest of a kind that none of those persons would ever regard, or could ever regard, as likely to make any difference to their financial situation or otherwise to affect their position. It could never lead to any improvement or impairment in the reputation, prestige or financial stability of Messrs. Haslewood, Hare & Co., or that of either of the two defendants in the case. For these reasons, I come to the conclusion that this is a statement made in circumstances that would come within the provisions of this section of the Act, if Mr. Symonds were not interested, that Mr. Symonds was not "a person interested," and that therefore this statement is admissible in evidence.

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